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# WILDLIFE AND THE CONSTITUTION: THE WALLS COME TUMBLING DOWN

George Cameron Coggins\*

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The federal law of wildlife has mushroomed during the past decade. Congress, in instances where certain species were suffering population crises, shed its historic reluctance to interfere with state wildlife management prerogatives. Opposition to federal intrusion has raised important constitutional issues, only some of which have been resolved definitively. Already the Congress and the courts have discarded some traditional assumptions about wildlife management, and the walls surrounding the traditional state prerogative to control resident wildlife are tumbling down. The fundamental question involves the extent to which the United States government constitutionally can regulate human activities that affect fauna and flora. Other intertwined issues concern the proper allocation of regulatory jurisdiction between federal and state governments within the framework of the United States Constitution. This article explores these constitutional issues.

## I. INTRODUCTION: WILDLIFE AND THE CONSTITUTION IN COURT

Determination of the limits of federal and state power to regulate the human activities that affect wildlife populations is not solely an academic exercise. Many significant private interests are directly or indirectly affected by wildlife regulation.<sup>1</sup> Sport hunters and fishermen, numbering in the millions, are often passionately attached to their sport and will rise up in protest against any attempt to curtail it beyond normal conservation regulations.<sup>2</sup> Even more numerous are the non-consumptive users, particularly birdwatchers and photographers. There are also, of course, some Americans who still rely on terrestrial wildlife as a primary food source; many of the nation's Indians may fall into this category.<sup>3</sup> Other groups utilize wildlife for livelihoods: trappers, guides, bounty hunters, wildlife biologists, and commercial fishermen all depend on the wildlife resource for their daily bread. Large numbers of administrators, wardens, and biologists are intimately concerned with wildlife regulation. Behind the individuals affected stand many institutions that are intimately bound up in

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1. See generally *WILDLIFE AND AMERICA* (H. Brokaw ed. 1979).

2. It is reasonably clear that neither sport hunting nor fishing is a "right," the full exercise of which is constitutionally protected, but it is an important "privilege" nonetheless. *Baldwin v. Fish & Game Comm'n*, 436 U.S. 371 (1978).

3. E.g., Hobbs, *Indian Hunting and Fishing Rights*, 32 GEO WASH L. REV 504, 507 (1964). If tribes are beneficiaries of a treaty, their interest qualifies as a "right" not subject to state defeasance, e.g., *Puyallup Tribe v. Washington Dep't of Game*, 391 U.S. 392 (1968) (*Puyallup I*), but this probably is vulnerable to federal restriction. Coggins & Modrcin, *Native American Indians and Federal Wildlife Law*, 31 STAN. L. REV 375 (1979). But see *United States v. Cutler*, 37 F. Supp. 724 (E.D. Idaho 1941).

wildlife exploitation and thus are particularly vulnerable to stringent regulation. Without furs, furriers go bankrupt. Without live targets, the arms and ammunition industry will see a severe decline in sales. Much of the pet trade is in wild species. Zoos, roadside wildlife attractions, and marine worlds are dependent upon the availability of live specimens.<sup>4</sup> Animals or their carcasses are also important for medical and biological research. A wide variety of dealers, importers, exporters, catchers, and poachers service these demands.<sup>5</sup> In addition, an unknown number of private organizations, which range from the National Rifle Association to the National Wildlife Federation to the Fund for Animals, are devoted to some aspect of wildlife welfare. Courts and legislatures frequently have turned receptive ears to their interests. All of the foregoing groups and individuals have demonstrated a willingness to litigate questions of wildlife management. To each, the validity of federal law and its effect upon state regulation is frequently crucial.

The United States Supreme Court decided eight cases in the past three years that directly involve wildlife protection or regulation.<sup>6</sup> Other decisions by the Court have important implications for wildlife management.<sup>7</sup> More cases of both types likely will be considered by the Supreme Court in the near future. In general, the cases have arisen under federal law, under Indian treaties, and under state law. Most of the decisions were directly premised upon provisions of the United States Constitution; others had constitutional overtones.

The cases arising under federal laws include *Cappaert v. United States*,<sup>8</sup> where the Court ruled that the implied federal reservation of sufficient groundwater to preserve the Devil's Hole Pupfish overrode the state-granted right of adjacent landowners to pump water from the common aquifer.<sup>9</sup> The 1976 opinion in *Kleppe v. New Mexico*<sup>10</sup> was a ringing affirmation of federal power to regulate and protect wildlife on federal

4. See Rosin, *Federal Regulations of Zoos*, 5 ENVTL AFF. 381 (1976).

5. See generally WILDLIFE AND AMERICA, *supra* note 1.

6. *Washington v. Washington State Comm'l Passenger Fishing Vessel Ass'n*, 99 S.Ct. 3055 (1979); *Hughes v. Oklahoma*, 441 U.S. 322 (1979); *United States v. New Mexico*, 438 U.S. 696 (1978); *TVA v. Hill*, 437 U.S. 153 (1978); *Baldwin v. Fish & Game Comm'n*, 436 U.S. 371 (1978); *Puyallup Tribe, Inc. v. Department of Game*, 433 U.S. 165 (1977) (*Puyallup III*); *Douglas v. Seacoast Prod., Inc.*, 431 U.S. 265 (1977); *Kleppe v. New Mexico*, 426 U.S. 529 (1976).

7. E.g., *United States v. New Mexico*, 438 U.S. 696 (1978). See note 9 *infra*.

8. 426 U.S. 128 (1976).

9. However, in *United States v. New Mexico*, 438 U.S. 696 (1978), the Court, in an opinion by Mr. Justice Rehnquist, refused to find that the reservation of a national forest also implied reservation of sufficient water to protect and nurture the wildlife and fish within the forest. A biting dissent argued that in 1897 Congress possessed a broader view of the nature of a forest than the majority assumed. Neither opinion questioned Congress' constitutional power to override state interests by prior implied reservation.

10. 426 U.S. 529 (1976).

lands, even in contravention of state law. However, it left open several questions necessary for delineating the ultimate limits of federal control over wildlife.<sup>11</sup> The hitherto unknown and insignificant Snail Darter, an endangered species of small perch, made a big splash in the highly-publicized Tellico Dam case,<sup>12</sup> but no party to that litigation challenged the constitutionality of the section of the Endangered Species Act at issue.<sup>13</sup> On February 27, 1979, the Court noted probable jurisdiction of the appeal in *Allard v. Andrus*,<sup>14</sup> a three-judge panel decision invalidating under the fifth and fourteenth amendments federal regulations governing possession and sale of bird artifacts legally acquired.<sup>15</sup>

The asserted supremacy of federal Indian treaty rights over attempted state limitations on Indian hunting and fishing practices has been a source of increasing litigation between Indian tribes and state governments, with federal agencies acting both as mediators and as trustees for the Indians' interests. In 1977, in the third *Puyallup* decision,<sup>16</sup> the Supreme Court held for the first time that states could regulate fishing by treaty Indians on the reservation if necessary for the preservation of a fish run.<sup>17</sup> In another case arising out of the intractable controversies over allocation of anadromous fish resources in the Northwest,<sup>18</sup> the Court two years later held that a federal district court was empowered to act as a regional fishmaster, and to override state law and practice in order to implement the Indian treaties as interpreted.<sup>19</sup> Yet another lawsuit, an original action brought by the State of Idaho against downstream states concerning the same general problem, is also pending.<sup>20</sup> The unprecedented volume of recent litigation challenging the power of states to regulate the taking and selling of valuable species by Indians and their licensees, together with

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11. *Kleppe* is discussed in more detail at notes 171-75 and accompanying text *infra*.

12. *TVA v. Hill*, 437 U.S. 153 (1978).

13. Endangered Species Act of 1973 § 7, Pub. L. No. 93-205, 87 Stat. 892 (current version at 16 U.S.C. § 1536 (1976)).

14. 440 U.S. 905 (1979).

15. The unreported lower court opinion and other cases involving similar questions are discussed in Part IV-B *infra*.

16. *Puyallup Tribe, Inc. v. Dep't of Game*, 433 U.S. 165 (1977) (*Puyallup III*). See Part V-B *infra*. The earlier decisions in the same litigation are *Washington Dep't of Game v. Puyallup Tribe*, 414 U.S. 44 (1973) (*Puyallup II*), and *Puyallup Tribe v. Washington Dep't of Game*, 391 U.S. 392 (1968) (*Puyallup I*).

17. Indian treaty and federal law preemption of state jurisdiction over Indian reservations and off-reservation practices is discussed in Part V-B *infra*.

18. *Washington v. Washington State Comm'l Passenger Fishing Vessel Ass'n*, 99 S. Ct. 3055 (1979).

19. The case grew out of and affirmed the major conclusions of the *Boldt* decision, *United States v. Washington*, 384 F. Supp. 312 (W.D. Wash. 1974), *aff'd*, 520 F.2d 676 (9th Cir. 1975), *cert. denied*, 423 U.S. 1086 (1976). See Part V-B *infra*.

20. *Idaho ex rel. Andrus v. Oregon*, 429 U.S. 163 (1976).

the difficulty of the issues not yet resolved,<sup>21</sup> indicates that preemption issues in this area will be brought to the Supreme Court even more frequently.

The constitutional validity of state rules governing wildlife exploitation has been litigated for well over a century,<sup>22</sup> but few hard-and-fast rules have emerged. In three recent cases concerning the power of states over wildlife regulation, the Court upheld Montana's severe discrimination against nonresidents in fees for hunting licenses,<sup>23</sup> threw out Virginia's statutes denying fishing licenses to aliens and restricting fishing rights of other nonresidents,<sup>24</sup> and overruled the venerable case of *Geer v. Connecticut*<sup>25</sup> while invalidating an Oklahoma law prohibiting the exportation of certain minnows.<sup>26</sup> Conflict with the commerce clause—not litigated in the first case—was the basis for decision in the latter two cases, while claims that the Montana law violated equal protection and privileges and immunities guarantees were rejected in the former.

Lower federal courts as well have faced a variety of questions concerning wildlife regulation, including the key issue of the constitutionality of recent federal statutes. The increase in federal litigation is due largely to the proliferation of federal statutes directed at wildlife protection, propagation, and management.<sup>27</sup> The constitutionality of most federal wildlife laws has been challenged in court: the Wild and Free-Roaming Horses and Burros Act of 1971 (WF-RHBA)<sup>28</sup> was upheld as it applied upon federal lands,<sup>29</sup> but challenges to its other applications are likely.<sup>30</sup> Although the Supreme Court in 1920<sup>31</sup> upheld the general constitutionality of the Migratory Bird Treaty Act of 1918 (MBTA),<sup>32</sup> litigants continue to assert the invalidity of some aspects of regulation under the Act. In addition to the *Allard* case,<sup>33</sup> certain MBTA "baiting" regulations have been

21. E.g., compare the cases cited at notes 61–62. See generally Coggins & Modrcin, *supra* note 3.

22. E.g., *Martin v. Waddell*, 41 U.S. (16 Pet.) 234 (1842).

23. *Baldwin v. Fish & Game Comm'n*, 436 U.S. 371 (1978). See notes 198–201 and accompanying text *infra*.

24. *Douglas v. Seacoast Prod., Inc.*, 431 U.S. 265 (1977). See notes 194–97 and accompanying text *infra*.

25. 161 U.S. 519 (1896).

26. *Hughes v. Oklahoma*, 441 U.S. 322 (1979). See notes 202–11 and accompanying text *infra*.

27. See generally M. BEAN, *THE EVOLUTION OF NATIONAL WILDLIFE LAW* (1977); Coggins, *Federal Wildlife Law Achieves Adolescence: Developments in the 1970's*, 1978 DUKE L.J. 753 [hereinafter cited as *Developments*].

28. 16 U.S.C. §§ 1331–1340 (1976).

29. *Kleppe v. New Mexico*, 426 U.S. 529 (1976).

30. See Part III–B *infra*.

31. *Missouri v. Holland*, 252 U.S. 416 (1920).

32. 16 U.S.C. §§ 703–711 (1976).

33. *Allard v. Andrus*, Civ. No. 75–W–1000 (D. Colo., filed June 7, 1976), *rev'd*, 48 U.S.L.W. 4013 (Nov. 27, 1979). Plaintiffs in *Allard* originally sought invalidation of both the MBTA and the

challenged, unsuccessfully, as unconstitutionally vague.<sup>34</sup> Some courts have invited constitutional challenge by creating an open-ended criminal liability for negligent actions and accidents resulting in bird mortality.<sup>35</sup> The Justice Department, allegedly,<sup>36</sup> has been loathe to press prosecutions under the Bald Eagle Act<sup>37</sup> for fear that it is invalid. The Montana federal district court recently threw out the entire federal Airborne Hunting Act<sup>38</sup> as a contravention of the tenth amendment,<sup>39</sup> but the Nebraska federal district court upheld the Act as a valid exercise of the commerce power shortly thereafter.<sup>40</sup> Two plaintiffs sought to invalidate the Marine Mammal Protection Act of 1972 (MMPA),<sup>41</sup> but their allegations that certain MMPA standards are irrational were rejected by the United States District Court for the District of Columbia.<sup>42</sup> Cases raising other constitutional issues under the MMPA are pending.<sup>43</sup> The Endangered Species Act of 1973 (ESA)<sup>44</sup> has been attacked in a variety of circumstances but has remained intact to date. Courts have rejected constitutional arguments against the assertion of federal power when federal law dictated state wildlife management actions,<sup>45</sup> and again when a federal agency confiscated a valuable inventory of legally acquired products made from an endangered species.<sup>46</sup> The case of a farmer allegedly beset by depredating but protected wolves is pending.<sup>47</sup> The general validity of these primary federal wildlife "species" statutes is the key inquiry. If they are constitu-

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Bald Eagle Act, but later dropped those contentions. See notes 380-97 and accompanying text *infra*.

34. United States v. Delahoussaye, 573 F.2d 910 (5th Cir. 1978); United States v. Jarman, 491 F.2d 764 (4th Cir. 1974); United States v. Atkinson, 468 F. Supp. 834 (E.D. Wis. 1979). See Part IV-C *infra*.

35. United States v. FMC Corp., 572 F.2d 902 (2d Cir. 1978); United States v. Corbin Farm Serv., 444 F. Supp. 510 (E.D. Cal.), *aff'd in part*, 578 F.2d 259 (9th Cir. 1978). See Part IV-C *infra*.

36. Soper, *The Constitutional Framework of Environmental Law*, in FEDERAL ENVIRONMENTAL LAW 34-35 (E. Dolgin & T. Guilbert eds. 1974).

37. 16 U.S.C. §§ 668-668d (1976).

38. 16 U.S.C. § 742j-1 (1976).

39. United States v. Helsey, 463 F. Supp. 1111 (D. Mont.), *rev'd*, No. 79-1100 slip. op. at 745 (9th Cir. Nov. 16, 1979).

40. United States v. Bair, 9 ELR 20324 (D. Neb. 1979).

41. 16 U.S.C. §§ 1361-1407 (1976).

42. Globe Fur Dyeing Corp. v. United States, 467 F. Supp. 177 (D.D.C. 1978).

43. Motor Vessels Theresa Ann v. Richardson, Civ. No. 76-963-E (S.D. Cal., filed Oct. 9, 1976); Motor Vessels Theresa Ann v. Richardson, 9 ERC 1726 (S.D. Cal.), *injunction stayed*, 9 ERC 2072 (9th Cir. 1977); American Tunaboat Ass'n v. Richardson, Civ. No. 76-971-E (S.D. Cal., filed Oct. 9, 1976). See notes 304-14 and accompanying text *infra*.

44. 16 U.S.C. §§ 1531-1543 (1976), *as amended* by Pub. L. No. 95-632, 92 Stat. 3751 (1978).

45. Palila v. Hawaii Dep't of Land & Natural Resources, 471 F. Supp. 985 (D. Hawaii 1979). See notes 318-28 and accompanying text *infra*.

46. Delbay Pharmaceuticals, Inc. v. Department of Commerce, 409 F. Supp. 637 (D.D.C. 1976). See Part IV-B *infra*.

47. Brzoznowski v. Secretary, Civ. 5-77-19 (D. Minn., filed Feb. 1977).

tional, considerable state regulation will be preempted, and the revolution in wildlife law will be affirmed.

Federal court cases considering international problems of domestic wildlife regulation have grappled with constitutional issues only peripherally. The Fifth Circuit has opined that principles of international comity require a restrictive interpretation of the extraterritorial scope of the MMPA. The court conceded that Congress constitutionally could forbid certain conduct in foreign territory,<sup>48</sup> but held that Congress did not intend to do so.<sup>49</sup> Alaskan Natives were unsuccessful in their assertion that the United States could not accede to an international arrangement depriving them of their right or interest in taking bowhead whales.<sup>50</sup> In a similar case, the federal district court of Alaska ruled that such questions are "political," thereby depriving the court of subject matter jurisdiction.<sup>51</sup> Domestic adjudication of the compatibility of seal harvesting practices in South Africa with domestic law gave rise to significant dicta on "case or controversy" standing questions in wildlife litigation.<sup>52</sup> And judicial evaluation of the purpose of Fijian statutes incorporated into federal law gave constitutional sanction to the assimilation of foreign law.<sup>53</sup>

The growth of federal law has created various conflicts with state laws and with many state philosophies and attitudes. Thus, the preemption doctrine under the supremacy clause has become increasingly important in matters of wildlife regulation. Two federal district courts held that new federal wildlife statutes in their application to commerce preempt more restrictive state legislation.<sup>54</sup> The Second Circuit<sup>55</sup> and New York state courts<sup>56</sup> had previously ruled otherwise in analogous circumstances. Less restrictive state regulation on federal<sup>57</sup> and state<sup>58</sup> lands has been struck

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48. *United States v. Mitchell*, 553 F.2d 996, 1001 (5th Cir. 1977).

49. The decision is analyzed in *Developments*, *supra* note 27, at 797-800; Note, *Extraterritorial Application of Federal Wildlife Statutes: A New Rule of Statutory Construction*, 12 CORNELL INT'L L.J. 143 (1979).

50. *Adams v. Vance*, 570 F.2d 950 (D.C. Cir. 1978).

51. *Hopson v. Kreps*, 462 F. Supp. 1374 (D. Alas. 1979). *Cf. Diggs v. Richardson*, 555 F.2d 848 (D.C. Cir. 1976). *But cf. United States v. Decker*, 600 F.2d 733, 738 n.8 (9th Cir. 1979).

52. *Animal Welfare Inst. v. Kreps*, 561 F.2d 1002 (D.C. Cir. 1977), *cert. denied*, 434 U.S. 1013 (1978).

53. *United States v. Molt*, 452 F. Supp. 1200 (E.D. Pa. 1978), *rev'd in part*, 599 F.2d 1217 (3d Cir. 1979). *See Part IV-A infra*.

54. *Fouke Co. v. Brown*, 463 F. Supp. 1142 (E.D. Cal. 1979); *Fouke Co. v. Mandel*, 386 F. Supp. 1341 (D. Md. 1974). *See Part V-A infra*.

55. *Palladio, Inc. v. Diamond*, 321 F. Supp. 630 (S.D.N.Y. 1970), *aff'd*, 440 F.2d 1319 (2d Cir. 1971), *cert. denied*, 404 U.S. 983 (1972).

56. *A.E. Nettleton Co. v. Diamond*, 27 N.Y.2d 182, 264 N.E.2d 118, 315 N.Y.S.2d 625 (1970), *appeal denied*, 401 U.S. 969 (1971).

57. *Kleppe v. New Mexico*, 426 U.S. 529 (1976).

58. *Palila v. Hawaii Dep't of Land & Natural Resources*, 471 F. Supp. 985 (D. Hawaii 1979).



down as well. Other courts are split over the preeminence of other federal statutes on other federal lands.<sup>59</sup> Many preemption cases involve attempted state wildlife regulation on Indian reservations or of tribal members who are treaty beneficiaries, and implicate longstanding controversies over jurisdiction among Indian tribes, state governments, and the federal government. Eskimos have been successful in initially preventing transfer of marine mammal regulatory jurisdiction to the State of Alaska,<sup>60</sup> and several tribes have been able to exclude all state wildlife regulation from their reservation,<sup>61</sup> although others have not.<sup>62</sup> These instances may be but harbingers of a future flood of litigation.

All of these cases, save the Supreme Court's assessment of the constitutional validity of state wildlife laws, represent fairly novel developments, for wildlife regulation has been only occasionally a legal matter for most of the Nation's history.<sup>63</sup> Wildlife is not mentioned in the Constitution, and seldom have litigants seen fit to pose constitutional problems in controversies over wildlife taking, protection, or management.

Wildlife law, moreover, is complicated by a long history of conceptualization and indifference. After a century of relative disinclination to consider wildlife preservation, states gradually enacted hunting codes and other means of ensuring an abundance of game.<sup>64</sup> Until recently, states have been conceded a nearly exclusive monopoly on wildlife regulation, a profitable prerogative which is cherished and adamantly defended.<sup>65</sup> The steady—and sometimes spectacular—erosion of state regulatory preeminence raises the problem of the proper jurisdictional allocation be-

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59. Compare *Defenders of Wildlife v. Andrus*, 9 ERC 2111 (D.D.C. 1977) (Alaska Wolf II) with *Alaska v. Andrus*, 591 F.2d 537 (9th Cir. 1979) (Alaska Wolf III).

60. *Togiak v. United States*, 470 F. Supp. 423 (D.D.C. 1979).

61. E.g., *Eastern Band of Cherokee Indians v. North Carolina Wildlife Resources Comm'n*, 588 F.2d 75 (4th Cir. 1978).

62. *United States v. Montana*, 598 F.2d 535 (9th Cir. 1979) (this opinion was published at this citation in the advance sheets, but was withdrawn from the bound volume by order of the court. See *id.* at n.1). Even federal jurisdiction over Indian hunting has been denied on occasion. See *Coggins & Modrcin*, *supra* note 3.

63. The law has long been concerned with notions of property and tort as they relate to animals *ferae naturae*, e.g., *Pierson v. Post*, 3 Cai. R. 175 (N.Y. Sup. Ct. 1805), but legal problems stemming from governmental efforts to promote healthy wildlife populations are a relatively recent phenomenon. See *Coggins & Smith, The Emerging Law of Wildlife: A Narrative Bibliography*, 6 ENVTL L. 583 (1975).

64. See generally *Lund, British Wildlife Law Before the American Revolution: Lessons from the Past*, 74 MICH. L. REV. 49 (1975) [hereinafter cited as *Lund I*]; *Lund, Early American Wildlife Law*, 51 N.Y.U. L. REV. 703 (1976) [hereinafter cited as *Lund II*].

65. See *Coggins & Hensley, Constitutional Limits on Federal Power to Protect and Manage Wildlife: Is the Endangered Species Act Endangered?*, 61 IOWA L. REV. 1099, 1150 (1976); *Comment, Regulation of Wildlife in the National Park System: Federal or State?*, 12 NAT. RESOURCES J. 627, 633 (1972).

tween states and the federal government.

The debate in legislatures, courts, agencies, and law reviews over the constitutionality of federal wildlife regulation has been disjointed and episodic, frenetically focused on each major Supreme Court pronouncement and then dying away until the next.<sup>66</sup> In fact, the major Supreme Court opinions are generally consistent in their evaluation of federal versus state powers over activities affecting wildlife, and federal legislation uniformly has rejected complete preemption in favor of cooperative jurisdictional arrangements. The debate is thus obsolete. It is time to recognize that present federal wildlife law is constitutional, and that even if it is extended broadly, it will remain within constitutional limits, at least in general outline. With that premise, particular enforcement problems and future federal-state regulatory relationships can be approached more rationally.

This article suggests the constitutionally permissible limits of federal wildlife regulation and its preemptive effect on parallel state efforts. Part II traces the major judicial pronouncements on the constitutionality of state and federal wildlife law in the context of the growth of federal regulation. The theme of this Part is the erosion and ultimate downfall of the state ownership doctrine. Part III assesses the validity of the present federal wildlife statutes not yet scrutinized by the Supreme Court, and it concludes that, in general, they are constitutional. Part IV discusses miscellaneous constitutional problems that have arisen with respect to particular severe applications of federal wildlife law. Assuming the validity of federal law, its preemptive effect and scope are assessed in Part V.

## II. THE DEVELOPMENT OF WILDLIFE LAW

The historical development of wildlife law and regulation has been the subject of considerable contemporary investigation.<sup>67</sup> This Part is limited to a general recapitulation that emphasizes several principles and facts relevant to present constitutional controversies. The first section traces the rise of the notion that states "own" wildlife. The second section outlines the systems of federal wildlife regulation that grew up in spite of the state ownership doctrine, and the third section follows the demise of that doctrine.

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66. The literary ebb and flow is traced in Coggins & Smith, *supra* note 63, at 604–06.

67. M. BEAN, *supra* note 27; J. TREFETHAN, *AN AMERICAN CRUSADE FOR WILDLIFE* (1975); Coggins & Hensley, *supra* note 65; Coggins & Smith, *supra* note 63; Lund I & II, *supra* note 64.

A. *The Growth of State Wildlife Regulation  
and the Ownership Doctrine*

New World colonists frequently shared—and oftentimes violently asserted—a loathing of any restriction on their rights to bear arms and shoot game.<sup>68</sup> This belief is still firmly ingrained in many Americans. Wildlife resources are renewable, and not infinite, as many have supposed.<sup>69</sup> Consequently, almost from the beginning of settlement on this continent, organized society has deemed some regulation necessary for the preservation of wildlife breeding stock.<sup>70</sup> The early ordinances of colonies, states, and localities were mostly hortatory, however, and their beneficial effect was limited to voluntary compliance by the populace.<sup>71</sup> Popular attitudes doomed early game conservation measures, and legal protection of non-game wildlife was unheard of. Game in the East declined.<sup>72</sup> Some species were extirpated intentionally.<sup>73</sup> Solitary species retreated from civilization and market gunning was common.<sup>74</sup> Many forms of wildlife were virtually exterminated from the frontier even before the first permanent settlers arrived. Mountain men brought the beaver to near-extinction in the Rockies. The progress of railroads meant the demise of the bison, and game was reduced to historically low levels by the turn of the century.

The glimmerings of new regulatory systems founded on a new attitude or ethic can be perceived as early as the exploitive Gilded Age.<sup>75</sup> The keys to modern wildlife management were the reinvention of the game warden in the latter 19th century,<sup>76</sup> and a shift in public opinion that led to a new legal regime under law. Except for isolated federal legislation concerning wildlife exploitation in the territories,<sup>77</sup> nineteenth century con-

68. Lund I, *supra* note 64, at 71.

69. W. HORNADAY, *OUR VANISHING WILD LIFE. ITS EXTERMINATION AND PRESERVATION* (1913), quotes an Ohio legislator speaking in 1857 against a bill to protect the "wonderfully prolific" passenger pigeon: "No ordinary destruction can lessen them, or be missed from the myriads that are yearly produced." The last passenger pigeon expired in a zoo the year after Hornaday's book appeared.

70. See generally D. ALLEN, *OUR WILDLIFE LEGACY* (rev. ed. 1962); I. GABRIELSON, *WILDLIFE MANAGEMENT* (1951); P. MATTHIESSEN, *WILDLIFE IN AMERICA* (1959); J. TREFETHAN, *supra* note 67.

71. Lund II, *supra* note 64, at 722-25.

72. Early 19th century efforts to preserve the heath hen failed and the bird became extinct. See J. TREFETHAN, *supra* note 67, at 210-12.

73. Wolves and other predators from time immemorial have been killed whenever and however possible. Bounty laws were among the first Colonial legislative efforts. See, e.g., D. ALLEN, *supra* note 70, at 258-76. See generally Comment, *Predator Control and the Federal Government*, 51 N.D. L. REV. 787 (1975).

74. See generally P. MATTHIESSEN, *supra* note 70, *passim*; J. TREFETHAN, *supra* note 67, *passim*.

75. See G. MARSH, *MAN AND NATURE* (1864).

76. J. TREFETHAN, *supra* note 67, at 109, 112-13. "Wardens" were, of course, common in medieval England.

77. See, e.g., *North Am. Comm'l Co. v. United States*, 171 U.S. 110 (1898), and *The James G. Swan*, 50 F. 108 (D. Wash. 1892) for a discussion of the legislation.

straints on taking wildlife were creatures of state law. State legislation was directed at preservation of a food source; neither recreational, ethical, nor aesthetic values were prominent in legislation until well into this century.

The legal foundation for state regulation was laid in a sporadic series of United States Supreme Court decisions that culminated in the rule that wildlife is owned by the several states in trust for the people. Under this rule, a state can impose whatever regulation it deems necessary to preserve the common resource. In Roman law, animals *ferae naturae* were deemed *res nullius*, the property of no one (like air or water) until reduced to possession.<sup>78</sup> The English system was far more complex and restrictive: "Stripped of its many formalities, the essential core of English wildlife law on the eve of the American Revolution was the complete authority of the King and the Parliament to determine what rights others might have with respect to the taking of wildlife."<sup>79</sup> The American colonists rejected the class-based English restrictions on arms and hunting,<sup>80</sup> but the states fell heir to the sovereign regulatory power. In 1842 the Supreme Court held that "the powers of sovereignty, [and] the prerogatives and regalities"<sup>81</sup> of the English Crown concerning wildlife had become vested in the states, "subject only to the rights since surrendered by the constitution to the general government."<sup>82</sup> From that edifice was constructed the state ownership doctrine. In a series of shellfish cases, the Supreme Court in the next fifty years held that Maryland could forbid certain methods of taking oysters;<sup>83</sup> that Virginia could prohibit residents of other states from planting or taking oysters in its tidewaters;<sup>84</sup> and that Massachusetts could prohibit the use of purse seines for catching menhaden in Buzzard's Bay.<sup>85</sup> The key decision in this doctrinal development was the 1896 case of *Geer v. Connecticut*.<sup>86</sup> In *Geer*, the Court upheld the conviction of one possessing legally taken game with intent to

78. See S. AMOS, *THE HISTORY AND PRINCIPLES OF THE CIVIL LAW OF ROME* 160–61 (1883); M. BEAN, *supra* note 27, at 8.

79. M. BEAN, *supra* note 27, at 12. See generally J. CHITTY, *A TREATISE ON THE GAME LAW AND ON FISHERIES* (1812); W. NELSON, *THE LAWS OF ENGLAND CONCERNING GAME, OF HUNTING, HAWKING, FISHING, AND FOWLING* (2d ed. 1732).

80. Lund II, *supra* note 64, at 715.

81. *Martin v. Waddell*, 41 U.S. (16 Pet.) 234, 267 (1842).

82. *Id.* at 263. See M. BEAN, *supra* note 27, at 12–14; MacGrady, *The Navigability Concept in the Civil and Common Law: Historical Development, Current Importance, and Some Doctrines That Don't Hold Water*, 3 FLA. ST. U. L. REV. 511, 554–55 (1975). See also *Pollard's Lessee v. Hagan*, 44 U.S. (3 How.) 212 (1845).

83. *Smith v. Maryland*, 59 U.S. (18 How.) 71 (1855).

84. *McCready v. Virginia*, 94 U.S. 391 (1877).

85. *Manchester v. Massachusetts*, 139 U.S. 240 (1891).

86. 161 U.S. 519 (1896).

export it from the state. After an extensive discourse on the ancient law of animals,<sup>87</sup> the *Geer* Court held that the Connecticut law was not a burden on interstate commerce because the state owned the game, it had a duty to preserve it, and “thus” could prevent it from entering interstate commerce.<sup>88</sup>

These cases in the aggregate, but especially *Geer*, gave rise to the widespread, frequently ardent belief that because a state owned its resident wildlife, its actions with respect to its property were subject to no constraints, not even to constitutional restrictions, and that the federal government was “correspondingly” powerless to regulate wildlife at all.<sup>89</sup> This belief, still prevalent in some quarters, never had a firm constitutional foundation. None of the nineteenth century cases involved conflicting federal regulation. Each of the cases relied on by states’ rights advocates posed only the question whether a particular state law burdened interstate commerce or invidiously discriminated against nonresidents. In each case, the Court significantly qualified its language. In *Martin v. Waddell*,<sup>90</sup> Chief Justice Taney noted that states’ powers over “the public common of piscary”<sup>91</sup> were subject to paramount federal powers which Taney did not essay to define.<sup>92</sup> The Court in the Maryland oyster case listed a series of open questions, including several involving federal powers.<sup>93</sup> The Massachusetts menhaden decision reserved the question of congressional power to control fishery.<sup>94</sup> The Virginia oyster decision simply affirmed state ownership.<sup>95</sup> The *Geer* Court, however, expressly limited its holdings on the powers of states with the caveat that the state power extended only “in so far as its exercise may not be incompatible with, or restrained by, the rights conveyed to the Federal government by the Constitution.”<sup>96</sup>

87. *Id.* at 522–29.

88. *Id.* at 530–34.

89. *Cf. Corwin, Game Protection and the Constitution*, 14 Mich. L. Rev. 613 (1916).

90. 41 U.S. (16 Pet.) 234 (1842).

91. *Id.* at 264.

92. *Id.* at 263.

93. In *Smith v. Maryland*, 59 U.S. (18 How.) 71 (1855), the Court stated:

Whether [the liberty of taking oysters from Maryland waters] belongs exclusively to the citizens of the State of Maryland, or may lawfully be enjoyed in common by all citizens of the United States; whether this public use may be restricted by the state to its own citizens, or a part of them, or by force of the Constitution of the United States, must remain common to all citizens of the United States; whether the national government, by a Treaty or Act of Congress, can grant to foreigners the right to participate therein; or what, in general, are the limits of the trust upon which the State holds this soil, or its power to define or control that trust, are matters wholly without the scope of this case, and upon which we give no opinion.

*Id.* at 75.

94. *Manchester v. Massachusetts*, 139 U.S. 240, 266 (1891).

95. *McCready v. Virginia*, 94 U.S. 391, 394–95 (1876).

96. 161 U.S. at 528.

The qualifying language in *Geer* was universally ignored, however, most notably by the Supreme Court itself in an eminently forgettable 1912 opinion, *The Abby Dodge*.<sup>97</sup> The United States sought forfeiture of a vessel used for taking sponges by means which violated a federal statute applicable to the Gulf of Mexico. The record did not specify whether the sponges had been taken within or without the assumed three-mile limit of state jurisdiction, but appellant argued that the federal statute was beyond the power of Congress whether or not it was intended to apply within the limit of “state” waters.<sup>98</sup> The United States did not claim that the Act was binding within state borders. Rather, it asserted that the United States had jurisdiction over foreign commerce and over actions beyond three miles, and that it had not been shown that any of the sponges had been taken within the boundaries of the state.<sup>99</sup> Chief Justice White, also the author of *Geer*, held that the Act applied only beyond state waters and remanded for a determination of the place of taking.<sup>100</sup>

This case is the first known instance of an asserted conflict between federal wildlife regulation and state power over wildlife. It has been cited for the proposition that “state ownership of wildlife is complete and precludes federal wildlife regulation.”<sup>101</sup> The holding, however, does not go that far. The Court stated preliminarily that the act would be unconstitutional if it applied within state boundaries,<sup>102</sup> but went on to hold that the Act only applied beyond the three-mile limit, thereby avoiding a direct resolution of the constitutional question.<sup>103</sup> Thus the Court’s statement—that if the Act applied within states, “the repugnancy of the act to the Constitution would plainly be established by the decisions of this court”<sup>104</sup>—is not only a flawed reading of those prior cases, but also is merely a dictum. In other words, the only holding in the case is that the statute only applied extraterritorially and, as such, was a permissible exercise of federal power over foreign commerce.

In any event, *The Abby Dodge* lost all precedential value almost immediately, and even as misconstrued, is widely regarded as an aberration in the law, one overturned *sub silentio* many times over.<sup>105</sup> The reach of the commerce clause has been broadened greatly since 1912,<sup>106</sup> the owner-

97. 223 U.S. 166 (1912).

98. *Id.* at 167–68.

99. *Id.* at 170.

100. *Id.* at 177–78.

101. Lundberg, *Birds, Bunnies and the Furbish Lousewort—Wildlife and Mining on the Public Lands*, 24 ROCKY MTN. MIN. L. INST. 93, 96 (1978).

102. 223 U.S. at 173.

103. *Id.* at 173–76.

104. *Id.* at 173.

105. See M. BEAN, *supra* note 27, at 33; notes 162–86 and accompanying text *infra*.

106. D. ENGAHL, *CONSTITUTIONAL POWER: FEDERAL AND STATE* 85–100 (1974); Coggin & Hens-

ship theory has been discarded,<sup>107</sup> and subsequent federal wildlife legislation uniformly has been upheld in the face of actual conflicts with state regulation.<sup>108</sup>

The early cases thus did not establish much by way of enduring constitutional principles. Severe state fisheries regulation was upheld in four notable instances, but the challenges to them were based on the commerce and privileges and immunities provisions of the Constitution. No conflict with federal regulation existed, even in the case of *The Abby Dodge*. The most that could be said was that states, by virtue of their sovereignty, had wide powers over human activities impinging on wildlife because the state owned the wildlife in trust for the people. The state ownership was always subject, however, to an undefined paramount federal power<sup>109</sup> that was not exercised significantly until this century.

### B. *The Growth of Federal Wildlife Law*

Because the evolution of federal wildlife law has been recounted in detail elsewhere,<sup>110</sup> this section will merely trace its broad outlines and sketch in the high points. Federal jurisdiction over marine fisheries and other marine resources beyond the assumed three-mile limit has generally been conceded, and the federal government's involvement with regulation of marine wildlife is long-standing and still growing rapidly.<sup>111</sup> The federal laws outlawing hunting in national parks originated in 1894,<sup>112</sup> and have never been challenged successfully.<sup>113</sup> By the Lacey Act of 1900,<sup>114</sup> the federal government made its cautious entry into standard wildlife management. The Act outlawed interstate commerce in fish and game taken illegally in the state of origin.<sup>115</sup> It thus served as a backstop for state efforts to preserve and manage resident wildlife, and as such was

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ley, *supra* note 65, at 1130-32; Part IV-B *infra*.

107. See II-C *infra*.

108. See notes 164-75 and accompanying text *infra*.

109. See notes 90-96 and accompanying text *supra*.

110. M. BEAN, *supra* note 27; *Developments*, *supra* note 27; Lundberg, *supra* note 101.

111. See, e.g., Coggins, *Legal Protection for Marine Mammals: An Overview of Innovative Resource Conservation Legislation*, 6 ENV'T'L L. 1 (1975) [hereinafter cited as *Marine Mammals*]. Federal jurisdiction over marine fisheries management was greatly expanded by passage of the Fishery Conservation and Management Act of 1976, 16 U.S.C. §§ 1801-1882 (Supp. 1977).

112. Act of May 7, 1894, ch. 72, 28 Stat. 73 (1894).

113. Cf. *New Mexico State Game Comm'n v. Udall*, 410 F.2d 1197 (10th Cir. 1969), *cert. denied*, 396 U.S. 961 (1970). See M. BEAN, *supra* note 27, at 26.

114. Ch. 553, 31 Stat. 187 (1900). The current version of the Lacey Act, as amended and expanded over the years, is codified at 16 U.S.C. §§ 667e, 701 (1976), and at 18 U.S.C. §§ 42-44 (1976).

115. See M. BEAN, *supra* note 27, at 108-15.

upheld as a valid exercise of the commerce power.<sup>116</sup>

From those modest beginnings, Congress, again and again over the decades, has mandated an active—if not intrusive—role for federal agencies in wildlife management. The federal wildlife statutes can be grouped roughly into those that govern public land management,<sup>117</sup> those that provide for financing of and federal cooperation with state fish and game agencies,<sup>118</sup> those that require consideration of wildlife values in all federal decisionmaking,<sup>119</sup> those that regulate commerce in wildlife and

116. *Rupert v. United States*, 181 F. 87 (8th Cir. 1910); *Eager v. Jonesboro, Lake City & E. Express Co.*, 103 Ark. 288, 147 S.W. 60 (1912).

117. Federal-state relationships are especially delicate in the matter of wildlife management on federal public lands. The federal government owns about one-third of the national land mass and divides it into five main systems for management. Excluding lands owned by the Post Office, the Defense Department, TVA, and other miscellaneous agencies, the bulk of the federal lands are in the Wilderness System, the National Park System, the National Forest System, the National Resources Lands System, and the National Wildlife Refuge System.

Whatever doubts there may have been about federal power to protect and manage wildlife on federal lands were removed by *Kleppe v. New Mexico*, 426 U.S. 529 (1976). Even so, Congress has trodden very cautiously in this emotion-laden area. The Sikes Act Extension, 16 U.S.C. §§ 670g-670h(c) (1976), requires a wildlife planning process for the federal public lands that will rely heavily on state cooperation and direction. Except for many units of the National Park System, in which no hunting is allowed, the organic legislation for the other systems specifies in each case that game regulation shall be pursuant to state law. *E.g.*, National Wildlife Refuge System Administration Act of 1966, 16 U.S.C. § 668dd(c) (1976). And in each case there is a reservoir of overriding discretion in the federal land manager of yet undetermined extent. *Id.* See *Defenders of Wildlife v. Andrus*, 9 ERC 2111 (D.D.C. 1977) (Alaska Wolf II); Part V-C *infra*. Federal and state agencies have worked out informally agreements limiting the federal role to habitat enhancement while states control the wildlife taking. See Gottshalk, *The State-Federal Partnership in Wildlife Conservation*, in *WILDLIFE AND AMERICA*, *supra* note 1, at 290, 291. Whether this agreement can survive in the face of arguably contrary federal statutes is uncertain.

118. Legislation since the mid-1930's has provided federal monies for state fish and game programs. The oldest and most successful is the Pittman-Robertson program whereby special taxes on guns and other sporting equipment are placed in a special fund for distribution to state agencies. Federal Aid in Wildlife Restoration Act, 16 U.S.C. §§ 669-669i (1976). With the \$687 million in receipts since 1937, states have acquired thousands of acres of wildlife habitat and conducted numerous other projects and programs. Gottshalk, *supra* note 117, at 297. The Dingell-Johnson bill does essentially the same thing for inland fish. Federal Aid in Fish Restoration Act, 16 U.S.C. §§ 777-777k (1976). The Land and Water Conservation Fund Act of 1964, U.S.C. §§ 460l-4 to 460l-11(1976), provides considerable supplementary funds to states for further habitat and recreational land acquisition. See Futrell, *Parks to the People: New Directions for the National Park Service*, 25 EMORY L.J. 255 (1976). Cost of other wildlife programs, such as predator control, are borne directly by the federal government. See Comment, *supra* note 73.

The mild irony in this system is that the state agencies resentful of any federal interference are subsidized to the point of dire dependence upon federal largess. Further, the only other assured source of state agency funds is a result of the most intrusive, yet unchallenged, federal statute: under Pittman-Robertson, state agencies are eligible for federal funds only if they are entitled by law to use all fishing and hunting license fees. 16 U.S.C. § 669 (1976). Thus, federal law not only has dictated state taxation policy, it has also contributed to the prevalent game production orientation of state managers by making them dependent upon license revenues from those they regulate.

119. Several statutes require federal agencies to take wildlife values into consideration in the planning of public and some private projects. The Fish and Wildlife Coordination Act of 1958, 16



wildlife products,<sup>120</sup> and those that require direct protection and management of designated species. The categories are by no means exclusive: many statutes have two, three or even four of the attributes listed. Further, the federal statutes are not all-encompassing nor entirely consistent, clear, or coherent.<sup>121</sup> It is probable that the evolution of federal wildlife law has not come to an end.<sup>122</sup>

Out of the current array of federal wildlife law, the area involving the greatest constitutional controversy is direct species protection. The Migratory Bird Treaty Act of 1918 (MBTA),<sup>123</sup> premised on an international agreement after an earlier federal act had been invalidated by several lower courts,<sup>124</sup> grants the Secretary of the Interior vast discretion over all native migratory birds. All persons are forbidden to take any such bird "by any means in any manner" unless it is done pursuant to federal permit or regulation.<sup>125</sup> After the Supreme Court upheld the MBTA under the treaty power,<sup>126</sup> a cooperative system grew up whereby the United States Fish and Wildlife Service, acting upon the advice of state agencies and regional councils, sets overall hunting guidelines and regulations which are then enforced primarily by the states.<sup>127</sup> The bald eagle was granted special protected status in 1940, for Congress foresaw the extinction of the national symbol if action were not taken.<sup>128</sup>

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U.S.C. §§ 661-667e (1976), for example, requires consideration of wildlife mitigation measures in the development of water resource projects. The water development agency must also apply that standard in licensing private projects that alter or affect navigable waters. See Parenteau, *Unfulfilled Mitigation Requirements of the Fish and Wildlife Coordination Act*, 42 TRANS. N. AM. WILDLIFE & NAT. RES. CONF. 179 (1977). Overriding all narrower consideration-type statutes is the National Environmental Policy Act of 1969, 42 U.S.C. §§ 4321-4361 (1976), which, while not mentioning wildlife, has had an enormous effect upon wildlife management. See, e.g., *Minnesota PIRG v. Butz*, 541 F.2d 1292 (8th Cir.), *stay denied*, 429 U.S. 925 (1976); *Defenders of Wildlife v. Andrus*, 9 ERC 2111 (D.D.C. 1977) (*Alaska Wolf II*). NEPA requires a determination of the adverse effects upon wildlife, *inter alia*, before any major federal action, including the licensing of private actions, can proceed.

120. All of the species statutes discussed below regulate commerce in the designated species. The Lacey Act of 1900, 16 U.S.C. §§ 667e, 701, 18 U.S.C. §§ 42-44 (1976), operates solely against interstate and foreign commerce and importation.

121. Bean, *Federal Wildlife Law*, in WILDLIFE AND AMERICA, *supra* note 1, at 279.

122. For example, now pending is a treaty draft by the Federal Republic of Germany for a Convention on the Conservation of Migratory Species of Wild Animals which, if agreed to, ratified, and implemented, would extend federal management and protection to all members of any species which cross international boundaries. Second Revised Draft Convention on the Conservation of Migratory Species of Wild Animals with Explanatory Notes, Dec. 1978, Germany. If enacted into domestic law, this extension of coverage would revolutionize federal wildlife law once again.

123. 16 U.S.C. §§ 703-711 (1976).

124. *United States v. McCullagh*, 221 F. 288 (D. Kan. 1915); *United States v. Shauver*, 214 F. 154 (E.D. Ark. 1914), *appeal dismissed*, 248 U.S. 594 (1919).

125. 16 U.S.C. §§ 703, 704 (1976).

126. *Missouri v. Holland*, 252 U.S. 416 (1920).

127. See Coggins & Patti, *The Resurrection and Expansion of the Migratory Bird Treaty Act*, 50 COLO. L. REV. 165 (1979).

128. Bald Eagle Protection Act of 1940, as amended, 16 U.S.C. §§ 668-668d (1976). The Bald

Following the 1940 Bald Eagle Act, direct federal species protection lay dormant for a generation. Dormancy ended with a spate of congressional activity in the early 1970's which nearly reversed traditional wildlife management presumptions as to the federally designated species. Under the ceaseless prodding of Wild Horse Annie Johnston,<sup>129</sup> Congress responded to the decline in herds of feral ungulates by passing the Airborne Hunting Act,<sup>130</sup> and then by enacting the Wild Free-Roaming Horses and Burros Act of 1971 (WF-RHBA).<sup>131</sup> The WF-RHBA decreed an end to all private killing of the animals and outlawed all commerce in carcasses.<sup>132</sup> Although the Bureau of Land Management and the Forest Service are allowed to remove some beasts, management is to be at the "minimal feasible level."<sup>133</sup> The constitutionality of WF-RHBA as applied to federal lands was upheld in 1976,<sup>134</sup> but other questions of its applicability remain unresolved.<sup>135</sup>

The Marine Mammals Protection Act of 1972 (MMPA),<sup>136</sup> covers an entire group of species—from sea otters to whales, and from dugongs to polar bears—and forbids their killing or sale except in defined circumstances or under express federal permission.<sup>137</sup> The MMPA affects international trade and international wildlife management practices, and severely restricts state management jurisdiction over coastal marine mammals.<sup>138</sup> Lawsuits asserting its invalidity—on somewhat shaky grounds—have not been successful.<sup>139</sup>

Federal protection of species deemed "endangered" (and, more recently, "threatened") dates from 1966. A simple hortatory statute of that year,<sup>140</sup> was strengthened by a 1969 amendment establishing a process

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Eagle Act was less than a screaming success: the species was listed as endangered in 1978. 43 Fed. Reg. 6, 230-33 (1978).

129. See Johnston, *The Fight to Save a Memory*, 50 Tex. L. Rev. 1055 (1972).

130. 18 U.S.C. § 47 (1976).

131. Pub. L. No. 92-195, 85 Stat. 649 (1971) (current version at 16 U.S.C. §§ 1331-1340 (1976)).

132. *Id.* § 1333.

133. *Id.* § 1333(a).

134. *Kleppe v. New Mexico*, 426 U.S. 529 (1976).

135. See note 242 and accompanying text *infra*.

136. Pub. L. No. 92-522, 86 Stat. 1027 (1972) (current version at 16 U.S.C. §§ 1361-1407 (1976)).

137. See generally M. BEAN, *supra* note 27, at ch. 11; *Marine Mammals*, *supra* note 111.

138. 16 U.S.C. §§ 1371(a), 1378, 1379(a) (1976). See M. BEAN, *supra* note 27, at 326-28.

139. See cases cited in notes 42-43 *supra*.

140. Endangered Species Preservation Act of 1966, Pub. L. No. 89-669, §§ 1-3, 80 Stat. 926 (1966) (repealed 1973). The Act directed the Secretary of the Interior to "carry out a program in the United States of conserving, protecting, restoring, and propagating" native fish and wildlife species "threatened with extinction," *id.* at § 2(a), and to review other programs under his authority, with a view toward utilizing them, "to the extent practicable," for furthering the purposes of the preservation program. *Id.* at § 2(d).

for administrative listing of species in dire trouble and authorizing importation controls and a few other limitations on trade in listed species.<sup>141</sup> Dissatisfied by the administrative timidity and lack of results produced under the 1969 amendment, and alarmed by perceived crises in extinction rates,<sup>142</sup> Congress enacted the Endangered Species Act of 1973 (ESA).<sup>143</sup> The Act recites the treaty power as authority for the furthest ranging, most drastic wildlife protection legislation ever enacted.<sup>144</sup> Every species of fauna or flora in the world that is or may become in danger of extinction is eligible for listing,<sup>145</sup> even if the population depletion is only in a "significant portion of its range."<sup>146</sup> Virtually all taking of and commerce in endangered wildlife species is prohibited,<sup>147</sup> and the Secretary of the Interior is given broad discretion over the protection of plants and threatened wildlife species.<sup>148</sup> Federal agencies are both forbidden to contribute to extinction and also enjoined to devote their efforts to preservation and propagation.<sup>149</sup> But the 1973 ESA is not limited to federal agencies or federal lands: all persons in any area are absolutely forbidden to harm or sell listed species.<sup>150</sup> As the most far-reaching federal wildlife statute, the Endangered Species Act is also the most vulnerable to basic constitutional attack.<sup>151</sup> Amendments in 1978,<sup>152</sup> in response to the infamous *Snail Darter* case, watered down the Act in some respects,<sup>153</sup>

141. Endangered Species Conservation Act of 1969, Pub. L. No. 91-135, 83 Stat. 275 (1969) (repealed 1973).

142. For the legislative history of the 1973 Act, see M. Bean, *supra* note 27, at ch. 12; Coggins, *Conserving Wildlife Resources: An Overview of the Endangered Species Act of 1973*, 51 N.D.L. REV. 315 (1974); Note, *Obligations of Federal Agencies Under Section 7 of the Endangered Species Act of 1973*, 28 STAN. L. REV. 1247 (1976). See also *TVA v. Hill*, 437 U.S. 153 (1978).

143. 16 U.S.C. §§ 1531-1543 (1976), as amended by Endangered Species Act Amendments of 1978, Pub. L. No. 95-632, § 2, 92 Stat. 3571 (1978).

144. 16 U.S.C. § 1531(4) (1976).

145. *Id.* at §§ 1533(a)-(c). The Supreme Court in *TVA v. Hill*, 437 U.S. 153, 159 n.8 (1978), quoted the director of the Endangered Species Program in the U.S. Fish and Wildlife Service:

The act covers every animal and plant species, subspecies, and population in the world needing protection. There are approximately 1.4 million full species of animals and 600,000 full species of plants in the world. Various authorities calculate as many as 10% of them—some 200,000—may need to be listed as Endangered or Threatened. When one counts in subspecies, not to mention individual populations, the total could increase to three to five times that number.

146. 16 U.S.C. §§ 1532(4), (15) (1976). See also *id.* at § 1533(c)(1).

147. *Id.* §§ 1538(a)(1)(B), (D), (E), 1539(a), (b), (e).

148. *Id.* § 1533(d).

149. *Id.* § 1536.

150. *Id.* §§ 1538(a), (g).

151. See Coggins & Hensley, *supra* note 65, at 1120-22.

152. Endangered Species Act Amendments of 1978, Pub. L. No. 95-632, § 4, 92 Stat. 3760 (1978).

153. See Stromberg, *The Endangered Species Act Amendments of 1978: A Step Backwards?*, 7 B. C. ENV'T'L AFF. L. REV. 33 (1979). The *Snail Darter* case is formally cited as *TVA v. Hill*, 437 U.S. 153 (1978).

but did not alter its scope or nature.<sup>154</sup> The notorious litigation under section 7 of the Act was not complicated by constitutional questions, but such issues are arising under its other provisions.<sup>155</sup>

In 1976, Congress moved to assert full control over offshore marine fisheries by enactment of the Fishery Conservation and Management Act (FCMA),<sup>156</sup> legislation faintly reminiscent of the Migratory Bird Treaty Act.<sup>157</sup> In essence, the FCMA provides that fishing within 200 miles of the terrestrial United States requires federal permission.<sup>158</sup> Complex structures and management criteria are mandated, the desired results being healthier fish populations and a healthier general marine environment.<sup>159</sup> In light of the long history of federal marine fisheries regulation,<sup>160</sup> challenges to the FCMA are more likely to be based on international law principles than on federal constitutional provisions.<sup>161</sup>

Federal wildlife law has grown in a rapid and disorganized manner—there is a lot of it, but the pieces do not necessarily fit together. There are, however, themes common to all of the species statutes: Each was enacted to combat species population declines caused at least in part by state inability or unwillingness to act positively; each accords states some role in implementation and enforcement; each has international ramifications; and each represents a federal denial of the limitations asserted to be inherent in *Geer* and *The Abby Dodge*.

### C. Demise of the State Ownership Doctrine

Congress quickly repudiated *The Abby Dodge* by passing the MBTA in 1913 and again in 1918.<sup>162</sup> Very shortly thereafter the Supreme Court consigned the case to a richly deserved constitutional limbo.<sup>163</sup> *Geer*,

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154. Section 7 was—remarkably—left intact. Congress created a cabinet-level committee to resolve conflicts between federal projects and listed species. The committee, in its first two decisions, refused to exempt Tellico Dam (the site of the snail darter controversy) and accepted the settlement terms of the Grayrocks Dam litigation, *Nebraska v. Rural Electrification Administration*, 12 ERC 1156 (D. Neb. 1978).

155. See notes 318–28 and accompanying text *infra*.

156. 16 U.S.C. §§ 1801–1882 (Supp. 1977).

157. The wide range of species covered, the statutory goals, the discretion accorded the administrator, and the federal-regional-state cooperative structures are similar.

158. 16 U.S.C. § 1821 (Supp. 1977).

159. *Id.* § 1853. See generally *Symposium*, 52 WASH. L. REV. 427 (1977).

160. See, e.g., *Douglas v. Seacoast Prods., Inc.*, 431 U.S. 265 (1977).

161. Federal power over foreign commerce and navigation, long recognized and exercised, fully supports the FCMA.

162. Migratory Bird Treaty Act of 1918, 16 U.S.C. §§ 703–711 (1976).

163. *The Abby Dodge* virtually disappeared from judicial decisions almost immediately, and its “federal power” dictum has never been used as controlling precedent by any other court. Dozens of later cases have ignored or ruled contrary to it without bothering to overrule it directly.

however, retained vitality and remained the cornerstone for the proponents of states' rights in wildlife management. This section traces the cases in which the *Geer* state ownership doctrine was progressively cut back until *Geer* itself was overruled in 1979. Two parallel lines of cases run throughout this period, one line evaluating federal legislation, and the other considering state statutes. Both lines contributed to the demise of the state ownership doctrine.

The first blow to the *Geer* doctrine was dealt by Justice Holmes in *Missouri v. Holland*<sup>164</sup> in upholding the MBTA as a valid exercise of the treaty power. Missouri (and Kansas as *amicus curiae*) claimed that the MBTA impermissibly infringed upon powers reserved to states by the tenth amendment. They also argued that the MBTA divested states of their property rights in birds. Holmes retorted:

No doubt it is true that as between a State and its inhabitants the State may regulate the killing and sale of such birds, but it does not follow that its authority is exclusive of paramount powers. To put the claim of the State upon title is to lean upon a slender reed. Wild birds are not in the possession of anyone; and possession is the beginning of ownership.<sup>165</sup>

*Geer* was merely mentioned and *The Abby Dodge* was not even cited. The Court also took pains to indicate that cases holding the previous migratory bird act unconstitutional were not necessarily rightly decided.<sup>166</sup> Later circuit court opinions indicated that they were wrongly decided by upholding the MBTA under the commerce clause.<sup>167</sup>

Federal power was upheld again in 1928, in *Hunt v. United States*.<sup>168</sup> The Supreme Court summarily dismissed state objections to the killing of excess deer by the Forest Service without compliance with state law.<sup>169</sup> Lower courts also extended that holding.<sup>170</sup>

The only other state challenge to federal wildlife regulation to reach the Supreme Court was *Kleppe v. New Mexico*<sup>171</sup> in 1976. New Mexico asserted that the Wild Horses Act went beyond protection of federal prop-

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164. 252 U.S. 416 (1920).

165. *Id.* at 434.

166. *Id.* at 433.

167. *Cerritos Gun Club v. Hall*, 96 F.2d 620 (9th Cir. 1938); *Cochrane v. United States*, 92 F.2d 623 (7th Cir. 1937).

168. 278 U.S. 96 (1928).

169. "[T]he power of the United States to thus protect its lands and property does not admit of doubt, . . . the game laws or any other statute of the state to the contrary notwithstanding." *Id.* at 100 (citations omitted).

170. *New Mexico Game Comm'n v. Udall*, 410 F.2d 1197 (10th Cir.), *cert. denied*, 396 U.S. 961 (1969); *Chalk v. United States*, 114 F.2d 207 (4th Cir. 1940); *Frost v. Garrison*, 201 F. Supp. 389 (D. Wyo. 1962).

171. 426 U.S. 529 (1976).

erty, emphasized in *Hunt*, to protection of the animals themselves. It claimed that because the animals were state property, the Act was beyond the scope of federal power.<sup>172</sup> A unanimous Court rejected the dubious distinction, holding that federal power over wildlife on federal lands was plenary, limited only by constitutional prohibition.<sup>173</sup> The commerce clause and other issues were not reached, nor was the ownership claim, although the opinion contained language indicating that the federal government might be able to claim a higher ownership priority.<sup>174</sup> Since no federal ownership claim had ever been made, however, that question remains open.<sup>175</sup>

The validity of state wildlife law has been a more frequent subject of litigation. In 1924, the Court considered whether Louisiana's levy of a "severance" tax on trapped fur and hide-bearing animals burdened interstate commerce. In holding that it did not, the opinion in *La Coste v. Department of Conservation*<sup>176</sup> cited *Geer* for the proposition that states own wildlife "so far as capable of ownership," but the decision did not rest on the ground that state ownership interdicted interstate commerce before it began.<sup>177</sup> A challenge in 1928 to another Louisiana statute further restricted *Geer*.<sup>178</sup> Louisiana required that all shrimp taken in its waters be processed in the state before interstate transportation. This imposed a considerable burden on plaintiff shrimpers for whom processing in Mississippi was far more economical. *Geer* supported Louisiana's argument that as owner, proprietor, and regulator of its wildlife, it could condition "transfer of title" as it chose.<sup>179</sup> The Court looked to *Geer* but rejected the argument. The conservation purpose behind the statute was "feigned" as Louisiana did not attempt to keep the shrimp as a domestic food source, so "[as] to such shrimp the protection of the commerce clause attaches at the time of taking."<sup>180</sup> The Court ruled that allowing the initial taking terminates state control, and "put[s] an end to the trust upon which the State is deemed to own or control the shrimp for the benefit of its people."<sup>181</sup>

172. The State's arguments are dissected in Coggins & Hensley, *supra* note 65.

173. 426 U.S. at 536-41.

174. *Id.* at 537-38.

175. This aspect is discussed further at notes 247-56 and accompanying text *infra*.

176. 263 U.S. 545 (1924).

177. *Id.* at 549. The tax was upheld as a valid police power measure designed to conserve the animals, the Court noting that the tax applied whether or not the pelts were shipped out of state. *Id.* at 550-51.

178. *Foster-Fountain Packing Co. v. Haydel*, 278 U.S. 1 (1928).

179. *Id.* at 8.

180. *Id.* at 12-13.

181. *Id.* at 13.

Commercial fishing for sponges, shrimps, oysters, and other offshore denizens has continued to occupy the Supreme Court and to contribute to *Geer's* demise. Although the Court did not cite it, *The Abby Dodge* was probably overruled in *Skeriot v. Florida*.<sup>182</sup> At issue was the converse of *The Abby Dodge* situation: defendant was convicted of violating a Florida statute prohibiting the use of diving suits in sponge fishing in the state's waters. He claimed Florida could not regulate activities outside of one marine league from its land boundaries.<sup>183</sup> The ownership of offshore lands was not resolved until some years later.<sup>184</sup> The *Skeriot* Court held only that Florida could control the activities of its citizens even on the high seas.<sup>185</sup> Significantly for these purposes, the Court also stated:

It is also clear that Florida has an interest in the proper maintenance of the sponge fishery and that the statute so far as applied to conduct within the territorial waters of Florida, *in the absence of conflicting federal legislation*, is within the police power of the State.<sup>186</sup>

The 1948 companion cases of *Toomer v. Witsell*<sup>187</sup> and *Takahashi v. Fish and Game Commission*<sup>188</sup> should have—but did not—overrule *Geer*. In *Toomer*, the Court examined two South Carolina statutes that taxed shrimp catch and required a shrimp fishery license fee for non-residents one hundred times that charged residents. The Court held that the latter statute violated the privileges and immunities clause. The state argued that it was regulating the corpus of its trust for the interests of its citizens. The Court unpersuasively distinguished *McCready v. Virginia*,<sup>189</sup> noted the “slender reed” comments of Justice Holmes, and went on to state: “The whole ownership theory, in fact, is now generally regarded as but a fiction expressive in legal shorthand of the importance to its people that a State have power to preserve and regulate the exploitation of an important resource.”<sup>190</sup> In a footnote, the Court commented that “the fiction appar-

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182. 313 U.S. 69 (1941).

183. *Id.* at 71.

184. *United States v. California*, 332 U.S. 19 (1947).

185. 313 U.S. at 76–79. The Court stated:

If the United States may control the conduct of its citizens upon the high seas, we see no reason why the State of Florida may not likewise govern the conduct of its citizens upon the high seas with respect to matters in which the State has a legitimate interest and where there is no conflict with acts of Congress.

*Id.* at 77.

186. *Id.* at 75 (emphasis added).

187. 334 U.S. 385 (1948).

188. 334 U.S. 410 (1948).

189. 94 U.S. 391 (1876). The basis for distinction was the migratory nature of the shrimp versus the sedentary nature of the oysters in *McCready*, which would remain in the state until harvested.

190. 334 U.S. at 402.

ently gained currency partly as a result of confusion between [Roman legal terms].”<sup>191</sup> In *Takahashi* the Court relied on the equal protection clause in holding that California could not deny a commercial fishing license to a resident alien on the ground that he was ineligible for U.S. citizenship.<sup>192</sup> The state ownership claim was rejected, conflicting cases were distinguished, and the assumed conservation purpose of the statute was deemed insufficient to justify an exception to the fourteenth amendment.<sup>193</sup>

*Toomer* was restricted and *Takahashi* reaffirmed by recent Supreme Court opinions. In *Douglas v. Seacoast Products Inc.*,<sup>194</sup> decided in 1977, Virginia statutes that denied commercial fishing licenses to aliens and restricted the rights of other non-residents to fish were struck down. The Court did not reach privileges and immunities or equal protection arguments because it found that federal licensing for “mackerel fisheries” under the ancient federal statute at issue in *Gibbons v. Ogden*<sup>195</sup> preempted the state laws. As to congressional power to regulate fisheries, the Court stated:

While appellant may be correct in arguing that at earlier times in our history there was some doubt whether Congress had power under the Commerce Clause to regulate the taking of fish in state waters [citing *McCready*, *Manchester*, and *Geer*], there can be no question today that such power exists where there is some effect on interstate commerce. . . . The movement of vessels from one State to another in search of fish, and back again to processing plants, is certainly activity which Congress could conclude affects interstate commerce.<sup>196</sup>

After the Court again dismissed ownership notions as nineteenth century legal fictions, it concluded that “[u]nder modern analysis, the question is simply whether the State has exercised its police power in conformity with the federal laws and Constitution.”<sup>197</sup>

The following year the Court distinguished *Toomer* in upholding a Montana game licensing system which allowed a resident to hunt elk for \$9 while requiring a non-resident to purchase a combination license for

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191. *Id.* at 402 n.37.

192. *Takahashi v. Fish & Game Comm’n*, 334 U.S. 410, 421 (1948).

193. *Id.* at 415–21. In *Patson v. Pennsylvania*, 232 U.S. 138 (1914), the Court had upheld a state law that barred aliens from hunting wild game. After discussing that case as well as *McCready*, *Geer*, and *Foster-Fountain*, the Court said: “To whatever extent the fish . . . may be ‘capable of ownership’ by California, we think that ‘ownership’ is inadequate to justify . . . excluding any or all aliens who are lawful residents . . . from making a living by fishing.” 334 U.S. at 421.

194. 431 U.S. 265 (1977).

195. 22 U.S. (9 Wheat.) 1 (1824).

196. 431 U.S. at 281–82 (citations omitted).

197. *Id.* at 284–85.



\$225. The majority in *Baldwin v. Fish and Game Commission of Montana*<sup>198</sup> found that the scheme was not totally unreasonable or discriminatory for a variety of reasons. However, the essence of its decision was that recreational hunting—as distinguished from the “livelihood” pursued by the *Toomer* plaintiffs—is not one of those fundamental rights necessary for national unity that is protected under the privileges and immunities clause.<sup>199</sup> *Geer* got a reprieve: the Court acknowledged that the doctrine for which it stands is anachronistic, but still thought that it represented a greater truth. “The fact that the State’s control over wildlife is not exclusive and absolute in the face of federal regulation and certain federally protected interests does not compel the conclusion that it is meaningless in their absence.”<sup>200</sup> Oddly enough, the *Baldwin* plaintiffs seem not to have raised objections under the commerce clause. Perhaps bedazzled by the similarities with *Toomer*, they may have forfeited a better argument.<sup>201</sup>

Less than a year later the Supreme Court used a case of little practical importance to overrule *Geer*, but offered little guidance to replace it. An Oklahoma statute prohibited the export of “natural” minnows while allowing export of commercially raised minnows. The Oklahoma appellate court upheld the statute against the contention that it unduly burdened interstate commerce by pointing to its conservation purpose and by relying on *Geer*.<sup>202</sup> Justice Brennan, writing for the 7–2 majority in *Hughes v. Oklahoma*,<sup>203</sup> first noted the rejection of the *Geer* analysis in cases involving state regulation of natural resources other than wildlife.<sup>204</sup> He

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198. 436 U.S. 371 (1978).

199. *Id.* at 388.

200. *Id.* at 386.

201. The big game hunting at issue is certainly of interstate character. Concentration on the hunters’ interest led to the relative exclusion of considering the guides’ and suppliers’ positions, both groups which are heavily dependent upon out-of-state customers. Interstate travel and interstate movement of goods and services are inextricably linked to and affected by the Montana system which facially impedes, exploits, and discriminates against it. On the surface, it is difficult to square the Montana license fee discrimination with the holdings in *Toomer*, *Hughes*, see notes 202–10 *infra*, and *Foster-Fountain*. Reconciliation can be achieved only through according the conservation purpose behind the state law the status of a complete defense. And, in fact, where state laws have been held to violate the commerce clause, the Court has painstakingly examined and rejected state “conservation” defenses. The Court has attached high importance to wildlife conservation purposes underlying state statutes in other areas. For example, even though Indians have a treaty right to take fish free of state game laws on the reservation, the state may still impose gross taking limitations if necessary to preserve the fish run. *Puyallup Tribe, Inc. v. Department of Game*, 433 U.S. 165 (1977) (*Puyallup III*).

202. *Hughes v. State*, 572 P.2d 573, 575 (Okla. Crim. App. 1978), *rev’d sub nom.* *Hughes v. Oklahoma*, 441 U.S. 322 (1979).

203. 441 U.S. 322 (1979).

204. *Id.* at 325–26. The Court declared that it had first rejected a *Geer*-like analysis in *West v. Kansas Natural Gas Co.*, 221 U.S. 229 (1911) (Oklahoma statute that forbade the export of natural

looked to the cases rejecting an attenuated “conservation” basis as a justification for restrictions on interstate commerce.<sup>205</sup> The shellfish cases then were analyzed to show that the “*Geer* analysis has also been eroded to the point of virtual extinction in cases involving regulation of wild animals.”<sup>206</sup> The only remaining vitality of *Geer* was in “cases involving complete embargoes on interstate commerce in a wild animal” which “created the anomalous result that the most burdensome laws enjoyed the most protection from Commerce Clause attack.”<sup>207</sup> The Court held that wildlife regulation would now be evaluated “according to the same general rule applied to state regulations of other natural resources.”<sup>208</sup> Under that test, the Oklahoma statute was invalid: it was overtly discriminatory and burdensome on its face, and its rationalization as a conservation measure would not stand because Oklahoma did not attempt to limit directly the number of “natural” minnows nor to regulate their disposition within the state.<sup>209</sup> On the other hand, dicta in the opinion strongly reaffirmed “in ways not inconsistent with the commerce clause, the legitimate state concerns for conservation and protection of wild animals underlying the 19th century legal fiction of state ownership.”<sup>210</sup> The dissenters, Justice Rehnquist and Chief Justice Burger, disagreed with the majority’s principal conclusions, but were comforted by its acknowledgment that states retain broad management powers.<sup>211</sup>

The persistent erosion and final demise of the state ownership concept as extrapolated from *Geer* is important primarily because *Geer* is the main, and perhaps the only, legal underpinning for the corollary notions, still fashionable in some conservative bastions, that state regulation is exclusive under the tenth amendment, and that all direct federal wildlife regulation save the MBTA is therefore invalid.<sup>212</sup> These corollary propo-

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gas struck down as offensive to the commerce clause).

205. *Id.* at 329–31. (citing *H.P. Hood & Sons, Inc. v. DuMond*, 336 U.S. 525 (1949), holding unconstitutional the state’s refusal to issue license for milk processing plant to a company intending to export milk purchased from local farmers, and *Pennsylvania v. West Virginia*, 262 U.S. 553 (1923) (invalidating state statute prohibiting export of natural gas)).

206. *Id.* at 331.

207. *Id.* at 333.

208. *Id.* at 335.

209. *Id.* at 336–38.

210. *Id.* at 335–36.

211. *Id.* at 341 n.4 (dissenting opinion).

212. Shortly before *Hughes* was announced, a federal judge threw out the federal Airborne Hunting Act on just those grounds. See *United States v. Helsey*, 463 F. Supp. 1111 (D. Mont. 1979), criticized at notes 283–96 and accompanying text *infra*. The Ninth Circuit recently reversed that decision. See No. 79–1100, slip op. at 745 (9th Cir. Nov. 16, 1979), and note 293 *infra*. As a legal position, the tenth amendment argument has been less than tenuous since *Missouri v. Holland*, 252 U.S. 416 (1920), but its persistence is rooted in politics and fear. State legislators and state game agencies deeply resent what they see as federal intrusion into a matter of local concern, and they fear

sitions are not merely eccentric. Congress has consistently deferred to state sensibilities in matters of wildlife regulation.<sup>213</sup> And, even in the absence of statutory guidance, federal regulators have consistently deferred to state agencies on many issues out of an ill-founded concern for—if not belief in—the sanctity of state preeminence.<sup>214</sup> The foundation for these misapprehensions has now collapsed.

It must be recognized, however, that while the Supreme Court has established some flexible principles concerning the constitutional powers of state and federal governments to regulate wildlife, it has decided relatively few specific questions. As to the power of the federal government, the Court's holdings can be quickly summarized. The Migratory Bird Treaty Act is in general valid as the domestic implementation of a valid treaty.<sup>215</sup> Federal marine fisheries legislation is valid under the commerce clause and preempts state law.<sup>216</sup> Federal agencies, if authorized to do so, may regulate wildlife on federal lands even in contravention of state law.<sup>217</sup> When the legislative command is clear, and the state law conflicts with it, the state law is preempted insofar as it was intended to operate on federal lands.<sup>218</sup> Congress or the President may set aside lands for the protection of wildlife,<sup>219</sup> and the withdrawal of water necessary to serve that purpose overrides conflicting subsequent state-created water rights.<sup>220</sup> Congress also may command federal agencies to refrain from taking actions that will harm certain species even though private and other governmental interests may suffer thereby.<sup>221</sup>

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the loss of license revenue should the federal government embark on a more active game management program. See Coggins & Hensley, *supra* note 65, at 1150.

213. See note 117 *supra*. A recent example of congressional deference is the pending Alaska Lands Bill. All early versions contained language virtually abdicating a federal role in wildlife management on retained federal lands. On the other hand, some members of Congress are less willing to concede to state control. See *Defenders of Wildlife v. Andrus*, 9 ERC 2111, 2115–17 (D.D.C. 1977) (Alaska Wolf II) (discussion of the legislative history of the Federal Land Policy and Management Act of 1976 (codified at 43 U.S.C. §§ 1701–1782 (1976))).

214. A brief history of federal-state wildlife agency relations, proceeding from the traditional state viewpoint but somewhat modified by the repeated decisions adverse to that position, is recounted in Gottshalk, *The State-Federal Partnership in Wildlife Conservation*, in *WILDLIFE AND AMERICA*, *supra* note 1, at 290–301.

215. *Missouri v. Holland*, 252 U.S. 416 (1920).

216. *Douglas v. Seacoast Prod., Inc.*, 431 U.S. 265 (1977).

217. *Kleppe v. New Mexico*, 426 U.S. 529 (1976); *Hunt v. United States*, 278 U.S. 96 (1928).

218. See cases cited in note 217 *supra*.

219. The principle is implicit in *Cappaert v. United States*, 426 U.S. 128 (1976), and explicit in *United States v. Little Lake Misere Land Co.*, 412 U.S. 580, 592–93 n.10 (1972), where, in reference to federal land acquisitions under the Migratory Bird Conservation Act of 1929, 16 U.S.C. §§ 715–715r (1976), the Court noted that “we deal with an unquestionably appropriate and specific exercise of congressional regulatory power.”

220. *Cappaert v. United States*, 426 U.S. 128 (1976).

221. *TVA v. Hill*, 437 U.S. 153 (1978).

The Court's decisions concerning state wildlife legislation have covered a wider range, but with less precision. The holdings of the nineteenth century cases are of little precedential value although many of the general principles enunciated therein have continuing relevance. The states have broad powers and discretion to conserve their wildlife. The state remains the trustee for the people even if it is not a technical owner. But state regulation must be consistent with constitutional constraints and guarantees. It cannot unduly burden interstate commerce,<sup>222</sup> it cannot abridge the privileges and immunities of non-residents in pursuing their livelihood,<sup>223</sup> it cannot forbid what the federal government has expressly permitted,<sup>224</sup> and it cannot deny equal protection by discriminating against resident aliens.<sup>225</sup> None of those prohibitions, however, is clear-cut or absolute; interstate commerce can be impeded to some extent if the state has a compelling conservation purpose;<sup>226</sup> only livelihoods, not recreational pursuits, are entitled to protection as privileges or immunities;<sup>227</sup> some discrimination against non-residents is permissible;<sup>228</sup> and the boundaries of federal preemption are vague.<sup>229</sup>

### III. FEDERAL POWER TO PROTECT AND MANAGE WILDLIFE

Wildlife law will remain inchoate and unsettled until the constitutionality of the present mosaic of federal wildlife law is definitively established. Without an authoritative ruling, states will continue to resist federal intrusion, federal officials will continue to be timorous or oversolicitous, and enforcement will continue to suffer.

Although federal wildlife statutes protect only a relatively few species of wildlife,<sup>230</sup> they are all-pervasive in that they proscribe or restrict all activities affecting those species in some situations. The ESA, for in-

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222. *Hughes v. Oklahoma*, 441 U.S. 322 (1979).

223. *Toomer v. Witsell*, 334 U.S. 385 (1948).

224. *Douglas v. Seacoast Prod., Inc.*, 431 U.S. 265 (1977).

225. *Takahashi v. Fish & Game Comm'n*, 334 U.S. 410 (1948).

226. *Lacoste v. Department of Conservation*, 263 U.S. 545 (1924) (upholding state's power to tax skins and hides intended for shipment in interstate commerce). Dicta in *Hughes v. Oklahoma*, 441 U.S. 322, 335-36 (1979), also support that conclusion.

227. *Baldwin v. Fish & Game Comm'n*, 436 U.S. 371 (1978).

228. *Id.*

229. See generally Part IV *infra*.

230. Federal law does not directly affect the great majority of non-avian wildlife in America (mammals, fishes, crustaceans, insects, reptiles, amphibians, and so forth); it directly protects only a small but growing number of endangered or threatened species plus, of course, the dozen or so species of marine mammals and two "species" of feral ungulates.

stance, absolutely prohibits certain actions by all persons at all times in all places.<sup>231</sup> Each of the five main federal species statutes forbids the killing of the designated animals on private as well as federal property. Moreover, Congress outlawed the sale of such species without evaluating their value or habits.<sup>232</sup> Whence derives Congress such all-encompassing power?

The existence or nonexistence of a general federal power to regulate wildlife has been and is being litigated in a variety of contexts. Even though federal wildlife statutes have been upheld in all but one lawsuit,<sup>233</sup> the depth of feeling engendered by the issue guarantees that new challenges will arise. Now that the "ownership" argument is no longer available, challengers may assert that wildlife regulation is necessarily a matter of local concern, that the state prerogative has been conceded by the history of federal acquiescence, that this is a power or right reserved to the states and their people by the tenth amendment, that federal law impermissibly intrudes into a fundamental facet of state sovereignty,<sup>234</sup> and that no enumerated constitutional power allows Congress to regulate wildlife off federal lands absent a treaty. Some cases may present claims that certain applications of the federal statutes violate the fifth and fourteenth amendments.<sup>235</sup> Federal wildlife law proponents will reply that all existing federal laws—and likely future extensions of such laws—are validly grounded in the property clause, the treaty clause, and the commerce clause, and are in any event "necessary and proper" to effectuate important national goals.

#### A. Which Statutes are Arguably Vulnerable?

Perusal of the wide spectrum of federal statutes narrows the inquiry considerably, for many are unquestionably valid. Most federal statutes are presumptively constitutional in whole or part either as a public land management measure or as a command to federal agencies. It is clear that

231. 16 U.S.C. § 1538(a)(1) (1976) ("any person subject to the jurisdiction of the United States" is prohibited without exception from "taking" endangered species). See, e.g., *Palila v. Hawaii Dep't of Land & Natural Resources*, 471 F. Supp. 985, 991-92 (D. Hawaii 1979) (holding defendant state among those defined as a "person" in the ESA).

232. See *Coggins & Hensley*, *supra* note 65, at 1112-22.

233. *United States v. Helsey*, 463 F. Supp. 1111 (D. Mont.) *rev'd*, No. 79-1100, slip op. at 745 (9th Cir. Nov. 16, 1979). See notes 283-92 and accompanying text *infra*.

234. This argument may be premised on *National League of Cities v. Usery*, 426 U.S. 833 (1976) (holding that federal wage and hour laws, as applied to state employees, impermissibly intruded into the separate and independent sovereign status of states). Any application of *National League of Cities* to federal wildlife law is at best highly unlikely. See Note, *Endangered Species Act: Constitutional Tensions and Regulatory Discord*, 4 COLUM. J. ENV'T'L L. 97 (1977).

235. E.g., *Globe Fur Dyeing Corp. v. United States*, 467 F. Supp. 177 (D.D.C. 1978).

pursuant to the property clause, congressional power over federal lands and their resources is plenary and overrides contrary state law.<sup>236</sup> The property clause alone is therefore a sufficient basis not only for all of the federal land management statutes,<sup>237</sup> but also for all of the species statutes insofar as they operate on public lands.<sup>238</sup> The Endangered Species Act, for instance, is partly immune to challenge on that ground.<sup>239</sup> Unquestionably Congress may command federal agencies to use wildlife values as a guiding or conclusive criterion in making resource allocation decisions.<sup>240</sup> Thus, the “consideration” statutes are reasonably invulnerable also. Further, no constitutional attack on the “financing” statutes is likely to be made or to succeed.<sup>241</sup>

The question is thus reduced primarily to the validity of the species statutes, other than the MBTA, as they operate directly to restrict individual activities on state or private lands. In *Kleppe v. New Mexico*, the Court declined to decide whether the Wild Horses Act was valid and overrode state law as to horses and burros found off federal lands.<sup>242</sup> Since none of the species statutes are limited to federal lands in their reach, a part of each statute remains constitutionally suspect.

### *B. Which Enumerated Powers Support Federal Wildlife Regulation?*

The application of federal wildlife laws to persons other than federal officers acting on non-federal lands is supported by three explicit and one or more implicit powers granted to Congress by the Constitution. The property clause has an extraterritorial reach of an undefined extent. The treaty power may serve to validate all federal species statutes by itself. The commerce clause is a firm foundation for the MMPA and probably for all of the other species statutes. Moreover, should none of those bases be deemed sufficient, Congress has, or should have, an inherent, derived power to pass legislation necessary and proper for the preservation of

236. *Kleppe v. New Mexico*, 426 U.S. 529 (1976), and cases cited therein.

237. See note 117 *supra*.

238. The Wild Horses Act, like the other federal species statutes, applies on private as well as federal lands. See *Coggins & Hensley*, *supra* note 65, at 1102–04. The Supreme Court’s holding in *Kleppe* that the statute was valid on federal lands perforce validates the other statutes insofar as they apply on federal public lands.

239. Section 7 of the ESA, 16 U.S.C. § 1536 (1976), applies to all federal actions, necessarily including public land management decisions. See *TVA v. Hill*, 437 U.S. 153 (1978). While many have questioned the wisdom of section 7, no one has doubted its constitutionality.

240. The pertinent statutes are listed in note 118 *supra*. In fact, no case has been located in which it was even claimed that NEPA and its ilk were constitutionally flawed.

241. Federal grants with federal conditions attached are common in all areas of governmental endeavor.

242. 426 U.S. at 546–47.

those things of practical or symbolic national importance.<sup>243</sup>

### 1. *The Property Clause*

In addition to the plenary power over federal lands that it gives to Congress, the property clause of the Constitution also supports legislation that protects federal lands by restricting activities on private lands. But the extent of its extraterritorial scope has never been well-defined because Congress rarely has chosen to exercise or test it. The power extends to adjacent lands to the extent necessary to protect federal lands from enclosure<sup>244</sup> or fire,<sup>245</sup> but it does not countenance the use or taking of adjacent lands for access without compensation.<sup>246</sup>

Does the property power authorize the regulation of wildlife off federal lands? It can be argued that the property clause supports the federal species statutes in two ways. First, from the premise that some member of nearly every species of native fauna spends some part of its life on federal land,<sup>247</sup> it could be contended that federal protection is acquired from that sojourn which attaches to all species wherever they may roam. The drawbacks to such a theory are obvious: it is highly and artificially conceptual; its factual premises cannot be proven conclusively; and it has no direct support in any case or statute other than the Wild Horses Act.<sup>248</sup> Nevertheless, it is mildly attractive as a simple solution.

Second, it could be argued that the United States has a property interest in all wild native fauna in the nation superior to that of any state or individual. The United States would not have to claim sole ownership or an

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243. That argument, premised on cases involving symbols such as flags and on language in *Missouri v. Holland*, 252 U.S. 416, 433 (1920), was made in *Coggins & Hensley*, *supra* note 65, at 1139-43. It may have been partially accepted in *Palila v. Hawaii Dep't of Land & Natural Resources*, 471 F. Supp. 985 (D. Ha. 1979), discussed at notes 318-28 accompanying text *infra*.

244. *Camfield v. United States*, 167 U.S. 518 (1897).

245. *United States v. Alford*, 274 U.S. 264 (1927). *See also* *Shannon v. United States*, 160 F. 870 (9th Cir. 1908); *United States v. Johnston*, 38 F. Supp. 4 (S.D.W.Va. 1941). *See generally* Engdahl, *State and Federal Power Over Federal Property*, 18 ARIZ. L. REV. 283 (1976); Sax, *Helpless Giants: The National Parks and the Regulation of Private Lands*, 75 MICH. L. REV. 239 (1977).

246. *Leo Sheep Co. v. United States*, 440 U.S. 668 (1979).

247. Note, *Federal Protection of Endangered Wildlife Species*, 22 STAN. L. REV. 1289, 1296 (1970).

248. Congress characterized wild horses and burros as components of the federal lands; they "are to be considered in the area where presently found, as an integral part of the natural system of the public lands." 16 U.S.C. § 1331 (1976). This formulation was sustained as a "'needful' regulation 'respecting' the public lands," in *Kleppe*, 426 U.S. at 536, but only as to public lands. In other cases, movement and migration, rather than place of sojourn, have been the key elements in sustaining the federal power under the commerce clause. *E.g.*, *Cerritos Gun Club v. Hall*, 96 F.2d 620 (9th Cir. 1938) (holding interstate bird migration to be interstate commerce and therefore subject to federal regulation).

exclusive right to control.<sup>249</sup> Instead, it could reason that this theory is the logical extension of the public trust doctrine whereby the government is entitled to—and indeed must—preserve public natural resources for the people.<sup>250</sup> The federal duty and power necessarily must be superior to that retained by the states,<sup>251</sup> because wildlife is a national resource which by its nature cannot be preserved or managed by state efforts alone.<sup>252</sup> A judicial holding that the United States “owned” wildlife would be revolutionary, would go far beyond present federal law, would be bitterly contested, and would appall many federal as well as state game officials. It would have the virtue, however, of cutting the ideological Gordian Knot that has so long detracted from cooperative state-federal management efforts by conceding that ultimate regulatory authority is at the level of government where in fact it has resided for some time. Again, this theory cannot find much precedential support.<sup>253</sup> On the other hand, the only cases denying federal “proprietorship” have rested on the discredited state ownership theory.<sup>254</sup> The federal agencies have never asserted an ownership claim, although the Supreme Court has invited such an assertion.<sup>255</sup> The federal government would be well-advised to accept the invitation, even if it has no intention of following it to its logical conclusion.<sup>256</sup>

249. In an earlier article, this writer argued that use of traditional property concepts in relation to creatures not actually owned in any real sense by either individuals or governments is inappropriate, and that the important question was rather the allocation of jurisdiction. Coggins & Hensley, *supra* note 65, at 1137–39. There is no good reason to depart from that position, which has been endorsed by the Supreme Court, insofar as the Court has overruled *Geer*. See notes 202–11 and accompanying text *supra*. If, however, property notions continue to be prominent, and if an easy way out of the jurisdictional dilemma is needed by Congress or courts, this “federal property” theory offers one avenue.

Even with the “state ownership” doctrine now discredited, there remain situations in which questions of ownership priority to wildlife are appropriate and important. Compare, e.g., *United States v. Long Cove Seafood, Inc.*, 582 F.2d 159 (2d Cir. 1978) with *United States v. Plott*, 345 F. Supp. 1229 (S.D.N.Y. 1972).

250. See W. RODGERS, *ENVIRONMENTAL LAW* 170–86 (1977). Cf. Sax, *The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention*, 68 MICH. L. REV. 471 (1970).

251. *Hughes v. Oklahoma*, 441 U.S. 322 (1979).

252. This is the premise upon which all of the federal species statutes were enacted. In each instance from the Migratory Bird Treaty Act of 1918 to the Endangered Species Act of 1973 Congress was impelled to act in part because of the inadequacy of state conservation measures. See, e.g., *Missouri v. Holland*, 252 U.S. 416, 435 (1920) (“[A] national interest of very nearly the first magnitude is involved. It can be protected only by national action in concert with that of another power. . . . But for the treaty and the statute there soon might be no birds for any powers to deal with.”).

253. Cf. *Palila v. Hawaii Dep’t of Land & Natural Resources*, 471 F. Supp. 985, 995 n.40 (D. Hawaii 1979).

254. E.g., *New Mexico v. Morton*, 406 F. Supp. 1237, 1238 (D.N.M. 1975), *rev’d sub nom. Kleppe v. New Mexico*, 426 U.S. 529 (1976).

255. *Kleppe v. New Mexico*, 426 U.S. 529, 537 (1976): “it is far from clear . . . that Congress cannot assert a property interest in the regulated horses and burros superior to that of the State.”

256. It is unlikely, however, that Congress would be willing to disturb severely the traditional



## 2. *The Treaty Power*

The MBTA, upheld under the treaty power in *Missouri v. Holland*,<sup>257</sup> applies to all persons, at all times, and in all places.<sup>258</sup> Implicit in that case are the propositions that wildlife protection is properly a matter of international concern and agreement,<sup>259</sup> and that broad domestic implementation of international wildlife treaties is valid, without regard to asserted reserved state powers.<sup>260</sup> If, then, the other four federal statutes implement international agreements, they are presumptively valid in all applications, at least to the extent they do not contravene individual rights and liberties.

A tenuous argument can be made that all federal wildlife statutes are supported by the treaty power. There are many international treaties concerning the protection of various species to which the United States is a party.<sup>261</sup> Two treaties are of particular relevance in this context: The 1973 Convention on International Trade in Endangered Species of Flora and Fauna (CITES)<sup>262</sup> and the 1940 Convention for Nature Protection In the Western Hemisphere.<sup>263</sup> These and other treaties were cited by Congress as agreements which the 1973 Endangered Species Act was designed to implement.<sup>264</sup> The ESA is valid, therefore, if two problems of interpretation can be overcome. First, the Act was passed and effective before the Treaty was ratified by the requisite number of nations in 1975.<sup>265</sup> That fact amounts merely to a formal legalism which should have no bearing on the statute's validity. The second obstacle is more substantial: CITES deals only with international trade in wildlife, while the ESA goes far beyond trade restrictions in its purported implementation. The Convention

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jurisdictional allocation. The "property" solution is offered as a means of resolving the question of power. Whether, or to what extent, the federal government should exercise such a power are separate questions not dealt with herein.

257. 252 U.S. 416 (1920).

258. Migratory Bird Treaty Act of 1918, 16 U.S.C. §§ 703, 705, 707 (1976).

259. See *Kleppe v. New Mexico*, 426 U.S. at 545.

260. "If the treaty is valid there can be no dispute about the validity of the statute . . . as a necessary and proper means to execute the powers of the Government." *Missouri v. Holland*, 252 U.S. at 432.

261. These are listed and reproduced in CONGRESSIONAL RESEARCH SERV., STAFF OF SENATE COMM ON COMMERCE, 95TH CONG 1ST SESS., TREATIES AND OTHER INTERNATIONAL AGREEMENTS ON FISHERIES, OCEANOGRAPHIC RESOURCES, AND WILDLIFE INVOLVING THE UNITED STATES (Comm. Print 1977). Now being considered is a treaty to protect all migratory species. See note 122 *supra*.

262. March 3, 1973, 27 U.S.T. 1087, T.I.A.S. No. 8249, reprinted in 12 INT'L LEG MATS 1085 (1973).

263. Oct. 12, 1940, 56 Stat. 1354 (1942), T.S. No. 981, 161 U.N.T.S. 173.

264. 16 U.S.C. §§ 1531 (4)(c), (f) (1976).

265. The Act was passed in December 1973 but the Treaty did not receive sufficient ratifications to become effective until July 1975. 73 DEP'T STATE BULL 607 (1975).

contemplates and encourages but does not require such measures.<sup>266</sup> The lack of precise convergence in language should be deemed immaterial. No such inquiry into the MBTA was undertaken in *Missouri v. Holland* and none is warranted now, for the ultimate objects of both treaty and statute are identical, and the means chosen in the statute both relate to and effectuate the ends of the treaty.

Assuming, as is probable, that CITES alone is sufficient support for application of the 1973 ESA, the inquiry into the general validity of federal species statutes is almost ended. The Bald Eagle Act has become virtually irrelevant because bald eagles are now covered by the MBTA and the 1973 ESA, as well as by the 1940 Act.<sup>267</sup> Horses and burros and non-endangered marine mammals would pose the only remaining constitutional problem of coverage.

Both likely may be protected by Congress under the commerce clause,<sup>268</sup> and both statutes also may be upheld as an implementation of the 1940 Convention. That treaty called for the preservation "in their natural habitat representatives of all species and genera of their native flora and fauna,"<sup>269</sup> and the signatories agreed to propose "suitable laws" to accomplish that end.<sup>270</sup> Arguments can be made that the 1971 and 1972 legislation was not intended to implement the 1940 treaty,<sup>271</sup> and other problems of interpretation are present.<sup>272</sup> However, the better case is in favor of the validity of all post-1940 federal wildlife legislation as means of implementing the treaty.<sup>273</sup>

### 3. The Commerce Clause

Even if the foregoing theories and doctrines were deemed insufficient to support federal species statutes, those laws can be upheld under the commerce clause.<sup>274</sup> The scope of the commerce power has become virtually unlimited.<sup>275</sup> The MBTA has been deemed a valid exercise of the commerce power as well as the treaty power,<sup>276</sup> and the Endangered Spe-

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266. Arts. vii, xiv, March 3, 1973, 27 U.S.T. 1087, T.I.A.S. No. 8249, reprinted in 12 INT'L LEG. MATS. 1085 (1973).

267. 50 C.F.R. §§ 10.13, 17.11 (1978).

268. See notes 274-81 and accompanying text *infra*.

269. Preamble, Oct. 12, 1940, 56 Stat. 1354 (1942), T.S. 981, 161 U.N.T.S. 173.

270. *Id.* at art. V.

271. Neither the Wild Horses nor Marine Mammal statutes mention any treaty. See Coggins & Hensley, *supra* note 65, at 1126-30, 1148.

272. For a discussion of those problems, such as scope, intent, and time differentials, see *id.*

273. *Id.* See notes 318-28 and accompanying text *infra* (discussion of the *Palila* case).

274. U.S. CONST. art. I, § 8, cl. 3.

275. See L. TRIBE, AMERICAN CONSTITUTIONAL LAW §§ 5-4 to 5-8 (1978).

276. See cases cited in note 167 *supra*.

cies Act has been upheld recently under the commerce clause.<sup>277</sup> It would be unreasonable to claim that wildlife in general and virtually every species likely to be contested in particular are not in or do not affect interstate commerce.<sup>278</sup> Horses supply the dog food market, and many people purchase items and cross state lines to observe them in their "natural" state.<sup>279</sup> Marine mammals by definition spend part of their lives in navigable waters over which the commerce power is without limitation.<sup>280</sup> Species that are not valuable for fur, meat, hide, oil, or feathers nevertheless frequently comprise tourist attractions patronized by interstate travelers. Many species, not counting migratory birds, often cross state and national boundaries or are found in navigable inland waters.<sup>281</sup> In short, while a few species may appear to be sedentary, lacking in economic value, and uninteresting, the overwhelming majority of American fauna clearly are in or affect interstate commerce and are thus subject to federal regulation.

### C. HOW HAVE THESE THEORIES FARED IN PRACTICE?

The foregoing powers, singly or in combination, almost conclusively establish the validity of federal wildlife statutes in relation to private persons and private property. But the question is not closed, for many litigants and a few courts continue to cling to turn-of-the-century conceptions when confronted with federal regulation of wildlife. At least seven cases have been brought since *Kleppe* was decided in 1976 in which parties have attempted to invalidate one or more federal wildlife statutes. Three plaintiffs lost, one dropped the invalidity argument,<sup>282</sup> and one prevailed. The remaining two cases are pending.

In *United States v. Helsey*,<sup>283</sup> the Montana Federal District Court ruled that the federal Airborne Hunting Act<sup>284</sup> violates the tenth amendment. The decision is wrong on all counts. The Act prohibits shooting animals from airplanes under penalty of a fine up to \$5,000 or a year's imprisonment or both.<sup>285</sup> Defendants, in the first reported case arising under the

277. See the discussion of the *Palila* case at notes 318-28 and accompanying text *infra*.

278. See Note, *supra* note 247, at 1300. See generally D. ENGBAHL, *supra* note 106, at 86-87.

279. See Coggins & Hensley, *supra* note 65, at 1132-34.

280. *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 196-97 (1824). See Wechsler, *Toward Neutral Principles of Constitutional Interpretation*, 73 HARV L. REV. 1, 23-24 (1959).

281. Note, *supra* note 247, at 1300.

282. *Andrus v. Allard*, 48 U.S.L.W. 4013 (Nov. 27, 1979), discussed at notes 380-97 and accompanying text *infra*.

283. 463 F. Supp. 1111 (D. Mont.) *rev'd*, No. 79-1100, slip op. at 75 (9th Cir. Dec. 14, 1979). See note 293 *infra*.

284. 16 U.S.C. § 742j-1 (1976).

285. *Id.* at § 742j-1(a). Exceptions are provided for employees and agents of state and federal governments. *Id.* at § 742j-1(b)(1).

Act, moved to dismiss the information, claiming "unlawful preemption of reserved state regulatory authority."<sup>286</sup> The court agreed in an opinion redolent with obsolete authorities and question-begging. The court opined that reserved tenth amendment powers are exclusive. It buttressed this conclusion by reference to the first child labor case,<sup>287</sup> now merely a discarded blot on our constitutional escutcheon.<sup>288</sup> The additional conclusion that wildlife regulation was one of those exclusive powers was reached by reliance on a misconceived interpretation of *Geer*<sup>289</sup> and on the two early migratory bird cases made irrelevant by *Missouri v. Holland*.<sup>290</sup> After a discursion into seemingly irrelevant Indian law, the court noted that federal legislators and agencies had doubts of the Airborne Hunting Act's validity, and it distinguished *Kleppe v. New Mexico* on the ground that the Act applied to all lands.<sup>291</sup> Interestingly, it appears from the opinion that the airborne nimrods were apprehended on an Indian reservation held by the United States in trust for the tribe.<sup>292</sup>

*Helsey* has subsequently been reversed by the Ninth Circuit.<sup>293</sup> Wildlife is not owned by the state, and states have no exclusive regulatory jurisdiction, whether or not the regulatory power was one reserved by the tenth amendment. If the offense occurred upon federal lands,<sup>294</sup> *Kleppe* and the property clause control and the court need go no further. The Act also will stand under the commerce clause: regulation of air travel is almost exclusively a federal function,<sup>295</sup> and the plane, its occupants, its use, and its weapons are in or affect interstate commerce.<sup>296</sup>

286. 463 F. Supp. at 1112.

287. *Hammer v. Dagenhart*, 247 U.S. 251 (1918).

288. *United States v. Darby*, 312 U.S. 100 (1941). See Engdahl, *State and Federal Power Over Federal Property*, 18 ARIZ. L. REV. 283, 312-14 (1976).

289. The court thought that *Geer* "determined that the right to control and regulate fish and wildlife is reserved to the states." 463 F.Supp. at 1113. There was not, however, a tenth amendment issue in *Geer*. A conflicting federal statute was not involved, and the case cannot be read to claim absolute exclusivity in any event. *Geer* was overruled shortly after *Helsey* was decided. *Hughes v. Oklahoma*, 441 U.S. 322, 326 (1979).

290. *United States v. McCullagh*, 221 F. 288 (D. Kan. 1915); *United States v. Shauver*, 214 F. 154 (E.D. Ark. 1914), *appeal dismissed*, 248 U.S. 594 (1919). See notes 164-67 and accompanying text *supra*.

291. The court stated that the Act "makes no differentiation between state, private, federal, or Indian trust lands," and is "simply a national hunting regulation." 463 F. Supp. at 1116.

292. The defendants were also charged with trespass upon Indian trust lands in violation of 18 U.S.C. § 1165 (1976). 463 F. Supp. at 1112. Whether or to what extent lands held by the United States in trust for tribes is "federal land" for purposes of the *Kleppe* rationale is beyond the scope of this article. See, e.g. *Stone v. United States*, 506 F.2d 561 (8th Cir. 1974).

293. The ninth circuit reversed *Helsey* while this article was being prepared for publication. No. 79-1100, slip op. at 745 (9th Cir. Nov. 16, 1979) (Act upheld under the commerce clause).

294. See note 292 *supra*.

295. *Burbank v. Lockheed Air Terminal, Inc.*, 411 U.S. 624 (1973) (preempting local noise ordinance).

296. Cf. Comment, *State Authority to Protect Wildlife Preserved as Supreme Court Finally*

The importance of the district court's opinion in *Helsey* is more in the judicial attitude it evinced than in its erroneous holding. In spite of the unbroken line of contrary authority, many—obviously including judges—still believe that the federal role in wildlife regulation is inappropriate. Most courts, however, whatever their feelings, have acknowledged the constitutionality of the federal effort.

One month after *Helsey* was decided by the Montana district court, the Nebraska federal district court reached the opposite conclusion on the same question in *United States v. Bair*.<sup>297</sup> Judge Urbom correctly found that *Geer* "has been substantially eroded both in its reliance on title to wildlife and, perhaps, by commerce clause cases,"<sup>298</sup> and that the issue was federal power, not the state power upheld in *Geer*. The Government eschewed reliance on the property clause, arguing that the Airborne Hunting Act was sustainable under either the treaty or commerce powers. The court was dubious as to the former claim, but finding ample support in the commerce cases,<sup>299</sup> did not decide it.<sup>300</sup> The court upheld the Act because Congress could reasonably have thought that such hunting "poses more than a minimal hazard to interstate commerce."<sup>301</sup>

Commercial plaintiffs have twice attacked the Marine Mammal Protection Act. One challenge failed and the other is doomed to failure. In *Globe Fur Dyeing Corp. v. United States*,<sup>302</sup> plaintiff importer claimed that the MMPA provisions banning the importation of skins taken from baby seals were so biologically irrational as to violate due process and equal protection guarantees. The District Court for the District of Columbia had no difficulty finding a rational relationship between the conservation purpose of the statute and the means chosen to achieve the purpose,<sup>303</sup> and summarily dismissed the suit.

In *The Motor Vessels Theresa Ann v. Richardson*,<sup>304</sup> tuna fishermen contend that the MMPA is unconstitutional in its application to them because: Congress did not find that porpoises affect interstate commerce; the right to fish for tuna is a fundamental right reserved to the people by

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*Overturms Geer v. Connecticut*, 9 ELR 10106, 10109-10 (1979).

297. 9 ELR 20324 (D. Neb. 1979).

298. *Id.* at 20325.

299. The court cited the wildlife cases but relied primarily on *United States v. Synnes*, 438 F.2d 764 (8th Cir.), *vacated on other grounds sub nom.* *United States v. Bass*, 404 U.S. 336 (1971) (felons and firearms). It is perhaps unfortunate that the court chose to rely so heavily on somewhat tenuous authority when far better arguments and authorities were available.

300. 9 ELR at 20325.

301. *Id.* at 20326.

302. 467 F. Supp 177 (D.D.C. 1978).

303. *Id.* at 179-80.

304. 9 ERC 1510 & 1726 (S.D. Cal.), *injunction stayed sub nom.* *Motor Vessels Theresa Ann v. Kreps*, 548 F.2d 1382 (9th Cir. 1977).

the ninth and tenth amendments; the Act works an inverse condemnation of their purse-seine boats; and it is an unlawful delegation of legislative authority.<sup>305</sup> The suit was brought in reaction to a decision of the District of Columbia Court of Appeals that caused a temporary shutdown of the American tuna industry after the yearly quota of porpoise deaths had been met.<sup>306</sup> The district court was skeptical of the constitutional claims but enjoined enforcement of the Act on pragmatic grounds.<sup>307</sup> The Ninth Circuit was even more skeptical and vacated the injunction.<sup>308</sup> No further decisions in the case have been reported.<sup>309</sup> The plaintiffs' contentions are wholly untenable. Even if the delegation doctrine has modern vitality, the MMPA abounds with strict standards the administrators must meet.<sup>310</sup> Any livelihood is an important interest,<sup>311</sup> but none rises above congressional power to regulate its exercise in the interest of conservation.<sup>312</sup> The contention that Congress had to or failed to make "findings" is plainly wrong on all counts,<sup>313</sup> and the argument that a "taking" of the plaintiffs' livelihood occurred is more than met by showing that as many tuna were taken after the MMPA went into effect as ever before.<sup>314</sup> The commerce power by itself is an adequate constitutional foundation for the MMPA, and plaintiffs must fail.

Several other federal statutes were attacked in *Allard v. Andrus*,<sup>315</sup> but the decision was limited to the validity of regulations under those Acts and will be discussed below. Another case is reportedly pending in which a Minnesota dairy farmer asserts the unconstitutionality of the Endangered Species Act insofar as it prevents him from killing wolves allegedly killing his cows.<sup>316</sup> No decision in the case was located, but a

305. Coggins, *Developments*, *supra* note 27, at 92-93 n.290.

306. Committee for Humane Legislation, Inc. v. Richardson, 540 F.2d 1141 (D.C. Cir. 1976). See Nafziger & Armstrong, *The Porpoise-Tuna Controversy: Management of Marine Resources after Committee for Humane Legislation, Inc. v. Richardson*, 7 ENV'T L. 223 (1977).

307. 9 ERC at 1726.

308. 9 ERC at 2072.

309. While this article was being prepared for publication, counsel for plaintiffs have informed the author that the lawsuit has been dismissed voluntarily.

310. See, e.g., *Animal Welfare Inst. v. Kreps*, 561 F.2d 1002 (D.C. Cir. 1977).

311. Compare *Toomer v. Witsell*, 334 U.S. 385 (1948), and *Takahashi v. Fish & Game Comm'n*, 334 U.S. 410 (1948), with *Baldwin v. Fish & Game Comm'n*, 436 U.S. 371 (1978).

312. Indian treaty beneficiaries, for instance, have a very high priority "right" to take a share of fish "at all usual and accustomed places," but even that right can be modified or regulated to preserve the resource. See Coggins & Modrcin, *supra* note 3, at 385-87, 392-95.

313. The cases of *Katzenbach v. McClung*, 379 U.S. 294, 298-300 (1964); and *United States v. Carolene Products Co.*, 304 U.S. 144, 152 (1938) establish that facts supporting the legislative judgment are presumed and can be garnered from hearing records. See Coggins & Hensley, *supra* note 65, at 1133.

314. Alverson, *Commercial Fishing*, in *WILDLIFE AND AMERICA*, *supra* note 1, at 67, 75 fig. 6.

315. See Part IV-B *infra*.

316. *Brozoznowski v. Secretary*, Civ. 5-77-19, (D. Minn., filed February, 1977).

related opinion holds that federal wolf control efforts adjacent to the same farm exceeded the scope of Interior Department regulations.<sup>317</sup> From the facts as reported in the latter decision, the extent of actual depredation appears minimal and the question insubstantial.

Yet another Endangered Species Act case, the *Palila* case,<sup>318</sup> decided in June, 1979, is destined, if appealed, to be dispositive of the issues considered in this section. The Palila (*Psittirostra bailleui*) is an endangered species of Hawaiian honeycreeper occupying a well-defined but shrinking habitat. The habitat, consisting primarily of state-owned mamane forests, also contains herds of feral sheep and goats which are maintained by the state to afford "sport" hunting. But the feral animals destroy the mamane forest and thus contribute to the precarious status of the forest-dependent Palila. The Sierra Club brought suit in the name of the species,<sup>319</sup> seeking an order requiring the removal of the sheep and goats from the Palila habitat area on the ground that maintenance of the herds was a "taking" of the endangered species prohibited by section 9 of the Endangered Species Act.<sup>320</sup> Plaintiffs prevailed on the merits, but more to the point for present purposes is the court's treatment of Hawaii's claim that the 1973 ESA is unconstitutional. The situation is close to the prototype described above as posing the ultimate question: the actions by state officials pursuing state policy took place on state land, and the species neither migrates across state lines nor has any apparent commercial value.

The district court recognized that no Supreme Court case was on point; even *Missouri v. Holland* was distinguishable because the species there involved were migratory.<sup>321</sup> But the holding in that case nevertheless controlled, the court ruled, because both the migratory bird treaty with Japan<sup>322</sup> and the 1940 Western Hemisphere Convention<sup>323</sup> covered the situation in issue. Whether those treaties are self-executing was deemed

317. *Fund for Animals v. Andrus*, 11 ERC 2189 (D. Minn. 1978) (Minnesota Wolf).

318. *Palila v. Hawaii Dep't of Land & Natural Resources*, 471 F. Supp. 985 (D. Hawaii 1979).

319. Cf. Stone, *Should Trees Have Standing? Toward Legal Rights for Natural Objects*, 45 S. CAL. L. REV. 450 (1972). Other plaintiffs were also named to avoid questions of standing.

320. 16 U.S.C. § 1538(a)(1)(B) (1976). The extensive definition of the activities that may amount to a prohibited taking are discussed in Coggins & Patti, *The Resurrection and Expansion of the Migratory Bird Treaty Act*, 50 COLO. L. REV. 165, 193-95 (1979).

321. 471 F. Supp. at 933 n.28. The court did, however, rely heavily on the principles enunciated in *Missouri v. Holland*, 252 U.S. 416 (1920). *Id.* at 992-94. The court also distinguished *Baldwin*, *Hughes*, and *Douglas*, but found within each implicit support for the federal legislation. *Id.* at 992, 992 nn.25-27.

322. Convention for the Protection of Migratory and Endangered Birds, March 4, 1972, 25 U.S.T. 3329, T.I.A.S. No. 7990. That the treaty dealt primarily with birds that migrated between American and Japanese territory was immaterial because (1) the Palila was among the species designated for protection; (2) only some sections were limited to migratory birds; and (3) island birds were the subject of special attention. 471 F. Supp. at 993, 993 n.31.

323. Oct. 12, 1940, 45 Stat. 1354 (1942), T.S. No. 981, 161 U.N.T.S. 173.

irrelevant, for Congress had acted to implement them. In doing so, said the court, Congress recognized “that protection of the Palila as an endangered species is a national interest of the first magnitude.”<sup>324</sup> The commerce clause too was thought to support the Act:

Congress has determined that protection of any endangered species anywhere is of the utmost importance to mankind, and that the major cause of extinction is destruction of natural habitat. In this context, a national program to protect and improve the natural habitats of endangered species preserves the possibilities of interstate commerce in these species and of interstate movement of persons, such as amateur students of nature or professional scientists who come to a state to observe and study these species, that would otherwise be lost by state inaction.<sup>325</sup>

The court then strongly intimated in a footnote that the United States “owned” the Palila.<sup>326</sup> It recognized that “the question goes two steps beyond *Kleppe*,” but stated that “[t]he importance of preserving such a national resource may be of such magnitude as to rise to the level of a federal property interest.”<sup>327</sup> Finally, the court disposed of the notion that the eleventh amendment immunizes Hawaii from this suit: states may be enjoined from violating federal law; Congress specifically authorized suits against states in this context; and Hawaii had waived any immunity by participating in the federal endangered species program.<sup>328</sup>

If upheld, the *Palila* case would conclusively answer the question of federal power. It dealt with the penultimate<sup>329</sup> situation: a non-migratory, commercially valueless species harmed by indirect but purposeful action of the state. If the federal government can protect the Palila (and force affirmative wildlife management methods on state lands) it can protect any species the Congress chooses.<sup>330</sup>

The foregoing discussion establishes with reasonable certainty that all existing federal wildlife legislation is in general constitutionally valid. That proposition is important as a practical matter, for when the question of basic constitutionality is resolved affirmatively, the analytical focus perforce proceeds to the problem of defining the new federal-state relationship in terms of jurisdiction over wildlife management. The initial problem is one of preemption: Given the validity of federal statutes, how

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324. 471 F. Supp. at 994 n.35.

325. *Id.* at 994–95 (footnotes omitted).

326. *Id.* at 995 n.40.

327. *Id.*

328. *Id.* at 995–99.

329. The ultimate question will arise when the sedentary, commercially valueless species is not protected by a treaty.

330. See Part V–D *infra*.



does that affect the validity or applicability of state statutes on the same subject? But before considering that question, *sui generis* constitutional objections to particular federal wildlife statutes and regulations will be examined.

#### IV. CONSTITUTIONAL PROBLEMS OF FEDERAL WILDLIFE LAW AS APPLIED

The foregoing discussion has considered the validity of federal wildlife regulation short of contravening express or implied constitutionally guaranteed freedoms. A federal statute aimed at constitutionally permissible goals may still be invalid if the means chosen by Congress or an implementing agency violate a constitutional prohibition. Three such potential problems are taken up in this Part. Section A recounts an instance of alleged unconstitutionality by assimilation. Section B discusses the burgeoning opinions wrestling with the question whether sale of a wildlife artifact that was acquired legally can be made a crime. Knowledge and scienter as requirements for criminal convictions in wildlife law enforcement actions are the subject of Section C.

##### A. *Unconstitutionality by Assimilation*

The Lacey Act prohibits, *inter alia*, importation and transportation of "any wildlife taken, transported, or sold in any manner in violation of any law or regulation of any State or foreign country."<sup>331</sup> Defendants in *United States v. Molt*<sup>332</sup> were charged with conspiracy to smuggle snakes into the United States in violation of Fijian and Papuan law. They moved to dismiss the indictment on the creative ground that the Lacey Act is unconstitutional because the foreign laws it assimilates might be unconstitutional if enacted here. The district court began with the proposition that "the mere fact that a foreign law could prove unconstitutional does not in and of itself provide a sufficient basis for invalidating the statute,"<sup>333</sup> but avoided just that question by holding that the foreign laws concededly violated were not the type of laws intended to be assimilated. The Fijian law was simply a revenue measure: no Fijian statute prohibited the exportation of any wildlife. In spite of testimony by an Australian federal judge that the Papua New Guinea law was intended for the protection of wildlife, the court held that it too was only a revenue law.<sup>334</sup> On

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331. 18 U.S.C. § 43(a)(2) (1976).

332. 452 F. Supp. 1200 (E.D. Pa. 1978), *rev'd in part*, 599 F.2d 1217 (3d Cir. 1979).

333. 452 F. Supp. at 1203 (emphasis omitted).

334. *Id.* at 1205-06.

appeal, the holding as to the latter law was reversed and the prosecution reinstated.<sup>335</sup> The constitutional assimilation contention was summarily rejected:

Defendants' objections to the constitutionality of the Lacey Act . . . are patently frivolous. The Act does not delegate legislative power to foreign governments, but simply limits the exclusion from the stream of foreign commerce to wildlife unlawfully taken abroad. The illegal taking is simply a fact entering into the description of the contraband article. . . . Congress could obviously exercise its plenary power over foreign commerce in such a manner if it so chose.<sup>336</sup>

The Supreme Court has upheld assimilation of prospective as well as present state law into federal law,<sup>337</sup> but *Molt* may be a case of first impression. Although the result appears unexceptional, the holding is important in that other federal wildlife laws, notably the ESA, also rely on foreign law to define the offense.<sup>338</sup>

### *B. Illegal Sale of an Artifact Legally Acquired*

In the changeover from no regulation to a system intended to preserve certain species, some interests are caught in the middle. Obviously, one of the most effective ways to reduce poaching for profit is to remove the market for the species taken. Every major federal wildlife statute follows and goes beyond that maxim by forbidding the possession, sale, and transportation as well as the taking or harassment of the species protected. Congress sometimes made provision for preexisting interests, but sometimes it did not. When no distinction was made between wildlife acquired before and after the effective date of the new regime, the question arises whether Congress constitutionally can make a crime out of the possession or sale of a wildlife artifact that was acquired legally. The problem is one of considerable practical importance because it is frequently difficult to distinguish between new and old artifacts such as feathers, hides, and scrimshaw. If the government must prove the date of taking as well as the fact of sale, enforcement will be greatly impeded. A review of prior cases will assist in analyzing the issues in a pending case soon to be decided by the Supreme Court.<sup>339</sup>

335. 599 F.2d at 1219–20.

336. *Id.* at 1219 n.1.

337. *United States v. Sharpnack*, 355 U.S. 286 (1958).

338. 16 U.S.C. § 1538 (1976).

339. The case was decided while this article was being prepared for publication. *Andrus v. Al-lard*, 48 U.S.L.W. 4013 (Nov. 27, 1979). See notes 380–97 and accompanying text *infra*.

The issue arose in a trio of district court decisions shortly after passage of the MBTA in 1918. In *United States v. Fuld Store Co.*,<sup>340</sup> the information charged the attempted sale of heron plumage acquired before passage of the Act. The MBTA simply stated that "it shall be unlawful . . . to . . . possess, offer for sale, [or] sell" any migratory bird or part thereof.<sup>341</sup> The court dismissed the information, holding that the Act could only apply prospectively; this was "perhaps the only construction which [would] sanction the act's validity."<sup>342</sup> The court opined that an attempt by Congress "to virtually outlaw and destroy such property" would contravene the fifth amendment as an uncompensated taking and might be "an ex post facto law within constitutional inhibition."<sup>343</sup> Although possession of game in the closed season that was acquired legally in the open season concededly was an offense under state law, the court rejected the analogy because the latter offense was "subject to a known condition."<sup>344</sup> Two years later, in 1922, the same judge demonstrated almost total contempt for federal migratory bird regulation by dismissing sua sponte a series of MBTA informations, including the alleged offenses of selling, offering to sell, and hunting after sunset.<sup>345</sup> In that instance, the court extended *Fuld Store* by holding that the information had to negate the possibility of prior acquisition, even though the facts indicated that at least one specimen was initially "fresh."<sup>346</sup> The "rule" of these cases was followed in *United States v. Marks*<sup>347</sup> in 1925.

Because these antediluvian interpretations are still cited as controlling,<sup>348</sup> further comments are in order. First, all three opinions reflected a prevailing philosophy that is inconsistent with the MBTA's philosophy and with contemporary theory. History has finally taught us—at least some of us—that no natural resource is infinite. Wildlife laws are now being taken seriously by the general populace as well as by Congress. Second, the rationale of *Fuld Store*—that Congress could not forbid commerce in an object legally acquired, and therefore Congress would not have meant to do so—is questionable and reverses the proper

340. 262 F. 836 (D. Mont. 1920).

341. 16 U.S.C. § 703 (1976).

342. 262 F. at 837.

343. *Id.*

344. *Id.* at 838.

345. *In re Informations Under the Migratory Bird Treaty Act*, 281 F. 546 (D. Mont. 1922). The informations were described as involving "unintentional and trifling infractions" which should have been ignored by any prosecutor "'who knows his business.'" *Id.* at 549. The judge's other comments were less kind.

346. A taxidermist allegedly received a bird for mounting which he "retained for a few days, until it spoiled and was thrown away." *Id.* at 548.

347. 4 F.2d 420 (S.D. Tex. 1925).

348. See the discussion of *Allard* at text accompanying notes 380–97 *infra*.

approach to the problem.<sup>349</sup> Third, the latter two cases did not necessarily follow from the first. It is a different thing to say that possession of artifacts known to be pre-existing is not criminal than it is to require the government to negate the possibility of legal acquisition. Finally, the cases did not distinguish between possession and sale. There matters rested for a half century.

The inclusion of raptors within the protection of the MBTA in 1972<sup>350</sup> set the stage for several recent cases concerning the application of the Act to wildlife products which may have been acquired legally. In *United States v. Blanket*,<sup>351</sup> defendant was charged with selling fans made from hawk feathers, and he asserted that the information was deficient because it did not allege the date of taking. The Oklahoma federal district court declined to follow the *Fuld Store* line of cases.<sup>352</sup> It held that prosecutors do not have to negate possible defenses in the charge, and that the contrary rule would severely weaken the Act by its impracticality.<sup>353</sup> Significantly, the court went further in dictum: "Assuming that possession prior to the effective date of the Act is a defense against selling after the effective date of the Act (*and the Court is not satisfied that this is necessarily so*) such would certainly be defensive."<sup>354</sup> As defendant did not prove

349. The *Fuld* approach is reminiscent of *The Abby Dodge*. See notes 97-104 and accompanying text *supra*. Like Chief Justice White, the author of *Abby Dodge*, the *Fuld* court started from a questionable conclusion that the MBTA did not apply retrospectively. The court then avoided what should have been the first question—what did Congress intend?—on the basis of the conclusion.

350. The original treaty with Canada, Convention for the Protection of Migratory Birds, Aug. 16, 1916, United States-Great Britain, 39 Stat. 1702, T.S. No. 628, was later supplemented by treaties with Mexico, Convention for the Protection of Migratory Birds and Game Mammals, Feb. 7, 1936, United States-Mexico, 50 Stat. 1311, T.S. No. 912, and with Japan, Convention for the Protection of Migratory Birds and Birds in Danger of Extinction, and Their Environment, Mar. 4, 1972, United States-Japan, 25 U.S.T. 3329, T.I.A.S. No. 7990. Accordingly, the original Migratory Bird Treaty Act, ch. 128, § 2, 40 Stat. 755 (1918), was amended to protect all birds listed under the subsequent treaties, ch. 634, § 3, 49 Stat. 1556 (1936); Pub. L. No. 93-300, § 1, 88 Stat. 190 (1974). The relevant section of the Act, as amended, now appears at 16 U.S.C. § 703 (1976). Another amendment will be required to add implementation of the recently ratified migratory bird treaty with Russia. See Comment, *Migratory Bird Treaty With Russia: Continued International Wildlife Protection*, 7 ENV'T L. REP. 10026 (1977).

Raptors are hawks, owls, and eagles, predatory carnivores for whom open seasons have been common through most of our history. But, pursuant to the authority of Article IV of the 1936 Mexican Convention as delegated to the Secretary of the Interior, the two governments by an exchange of notes on March 20, 1972 agreed to an expanded list of protected species, including raptors. See M. BEAN, *supra* note 27, at 70 n.12. The list is at 50 C.F.R. § 10.13 (1978).

351. 391 F. Supp. 15 (W.D. Okla. 1975).

352. *Id.*

353. *Id.* at 17-18. " 'Practically speaking, it would foreclose prosecution in most cases . . . since rarely would [the taking information] be available to the prosecution. The source of the feathers sold by the accused would ordinarily be . . . peculiarly within his knowledge.' " *Id.* at 19 n.1 (quoting *Fippin v. United States*, 162 F.2d 128 (9th Cir. 1947)).

354. *Id.* at 19 n.1 (emphasis added).

legal acquisition, neither the constitutional nor the statutory question was reached, and the conviction was affirmed. *Blanket* was followed in *United States v. Hamel*,<sup>355</sup> a prosecution of a taxidermist for offering to sell a recently protected stuffed snowy owl. The ultimate question—whether criminality could attach to sales of legally acquired artifacts—again was not reached. The Ninth Circuit did, however, disavow *Fuld Store* and company.<sup>356</sup>

In *Delbay Pharmaceuticals, Inc. v. Department of Commerce*,<sup>357</sup> the District Court for the District of Columbia did reach this issue, and upheld the application of the Endangered Species Act to legally acquired products. Plaintiff's assignor had acquired a large stock of spermaceti, a whale product, under federal permit.<sup>358</sup> Thereafter, the new Endangered Species Act of 1973 outlawed all commerce in products from listed species.<sup>359</sup> The Department of Commerce seized not only the raw stock but also the commercial preparation into which it had been manufactured.<sup>360</sup> Plaintiff's suit for its recovery alleged due process violations and general arbitrariness. The court disposed of the contentions almost summarily. It held that the import permit granted a right to import and no more;<sup>361</sup> legal acquisition under permit gives no uncontrovertible right to possess or sell;<sup>362</sup> Congress could rationally have believed that live species could be fully protected only by a total ban on commerce in their products;<sup>363</sup> the Act's operation is not retroactive because only post-enactment activities were involved;<sup>364</sup> enforcement difficulties of a contrary holding make the ban a rational choice of means;<sup>365</sup> and the court must defer to that legisla-

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355. 534 F.2d 1354 (9th Cir. 1976).

356. *Id.* at 1356.

357. 409 F. Supp. 637 (D.D.C. 1976).

358. The "economic hardship" permit had been issued pursuant to section 3(b) of the Endangered Species Conservation Act of 1969, Pub. L. No. 91-135, 83 Stat. 275 (repealed 1973). Under the permit, which was in effect for ten months in 1971, another company had imported several thousand tons of sperm whale oil, some of which was sold to plaintiff in 1974 and 1975. 409 F. Supp. at 640.

359. 16 U.S.C. §§ 1538(a)(1)(A), (E), (F) (1976). The sperm whale had been listed as endangered since 1970. 35 Fed. Reg. 18, 319 (1970) (codified at 50 C.F.R. § 17.11 (1978)).

360. The manufactured product was worth an estimated \$1.5 million. 409 F. Supp. at 640-41.

361. *Id.* at 641, 643. "If this were not the case, then one importing spermaceti pursuant to a hardship exemption would be placed in a superior position to one who had lawfully imported spermaceti prior to the enactment of the 1969 Act. This certainly was not the intent of Congress." *Id.* at 641.

362. *Id.*

363. *Id.* at 642, 644. The court noted that there is difficulty in distinguishing between "legal" and "illegal" spermaceti, and that for enforcement purposes, "[a] total ban is easier to enforce than a partial ban." *Id.* at 642. The enforcement difficulty of course leads to increased illegal taking by assisting in the maintenance of a market for goods made from threatened species. This rationale accords with *Blanket*, *Hamel*, and *Richards*.

364. 409 F. Supp. at 642.

365. See note 363 *supra*.

tive choice.<sup>366</sup> The court concluded that due process was not violated: "Since the beginning of this century, the Supreme Court, with few exceptions since overruled, has consistently upheld the power of Congress under the Commerce Clause to exclude from the channels of interstate commerce those products whose movements between the states the Congress deems harmful to the national welfare."<sup>367</sup> The court also indicated that the prohibition on sale would extend to one who imported the product prior to the institution of permit requirements.<sup>368</sup> Finally, in response to plaintiff's contention that the Act constituted an uncompensated taking, the court merely responded in a footnote that if such were the case, plaintiff could seek compensation in the Court of Claims.<sup>369</sup> Following the *Delbay* decision, Congress amended the ESA to authorize economic hardship permits for disposition of pre-Act scrimshaw and whale oil.<sup>370</sup>

Raptors again became the subject of controversy in *United States v. Richards*,<sup>371</sup> the most recent case to consider this issue. Since 1966 the Fish and Wildlife Service has attempted to regulate ordinarily wild birds raised in captivity.<sup>372</sup> Richards was "a college professor of good reputation and high community standing"<sup>373</sup> who acquired sparrow hawks legally and raised their offspring in captivity for falconry.<sup>374</sup> Richards was warned but chose to test regulations promulgated under the MBTA by selling the young.<sup>375</sup> He was convicted of three counts of violating the MBTA and harshly sentenced.<sup>376</sup> On appeal, the Tenth Circuit dealt mostly with definitions and questions of congressional intent.<sup>377</sup> The court also held, however, that the acquisition of the parents under a state

366. 409 F. Supp. at 644.

367. *Id.* at 643-44 (citing *United States v. Darby*, 312 U.S. 100 (1941); *Hipolite Egg. Co. v. United States*, 220 U.S. 45 (1911); and *Reid v. Colorado*, 187 U.S. 137 (1902)). The court also found a close analogy in *Century Arms, Inc. v. Kennedy*, 323 F. Supp. 1002 (D. Vt.), *aff'd*, 449 F.2d 1306 (2d Cir. 1971), *cert. denied*, 405 U.S. 1065 (1972). 409 F. Supp. at 644-45 n.2.

368. 409 F. Supp. at 641, 643.

369. *Id.* at 645 n.3.

370. Pub. L. No. 94-359, §§ 2, 3, 90 Stat. 911 (1976) (codified at 16 U.S.C. § 1539) (Supp. 1978)).

371. 583 F.2d 491 (10th Cir. 1978).

372. 31 Fed. Reg. 11231 (1966) (amending 50 C.F.R. § 12.12 (1965)).

373. 583 F.2d at 497.

374. *Id.* at 493-94.

375. *Id.* at 493.

376. *Id.*

377. The court rejected defendant's contention that only "wild" birds were protected by the Act by noting that the language of the Act referred to "migratory" birds. That captive birds do not migrate was seen as "immaterial" since "[t]he question is whether the [birds] . . . sold belong to a species or group that migrate, not whether the particular birds migrate." 583 F.2d at 494-95. Because the Act specifically authorized the promulgation of regulations governing "when . . . if at all, and by what means" birds could be sold or purchased, 16 U.S.C. § 704 (1976), and because neither the Act nor the relevant congressional committee reports made mention of captive nongame birds,

permit for scientific purposes did not create a property right such that the later prohibition on sale of offspring unconstitutionally deprived defendant of property.<sup>378</sup> Implicit in the court's affirmance was the holding that Congress could—and did—make criminal the sale of a legally acquired wildlife specimen. The dissent did not question the power of Congress but contended the majority misread intention.<sup>379</sup>

The taking issue became critical in *Allard v. Andrus*.<sup>380</sup> Persons owning and dealing in American Indian artifacts originally sought invalidation of the Migratory Bird and Bald Eagle Acts,<sup>381</sup> but, by the time of decision in 1978, their contention had narrowed to a claim that "the defendants' [Fish and Wildlife Service officers] application of these statutes and regulations to preexisting artifacts restricts their ability to engage in lawful occupation and destroys a valuable property right all in violation of the constitutional guaranty of due process."<sup>382</sup> The regulations in question allowed the possession and transportation of such artifacts without a federal permit, but outlawed any sale or other commercial transac-

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little weight was granted to certain remarks made during congressional debate on the Act suggesting that protection of captive birds was not intended. 583 F.2d at 494-95. The court considered it unimportant that for fifty years the administrative regulations had not protected captive birds, since "[n]on-exercise of a granted power does not destroy the grant of that power." *Id.* at 495. And, the regulations were deemed reasonable because the difficulty in distinguishing captive-raised birds from others of the same species would, as a practical matter, render enforcement of the Act difficult if the defense were available that the birds involved were raised in captivity. *Id.* See Coggins & Patti, *supra* note 320, at 178-79.

378. Noting that the state permits authorized possession or sale only under certain conditions, the court declared that "[a]t the most, the states granted a partial property interest which did not encompass all usual property rights." 583 F.2d at 496. The court "rejected defendant's claims of unconstitutional deprivation of property." *Id.*

379. *Id.* at 497-501 (Logan, J., dissenting). *Allard v. Andrus* had been decided by a district court in Colorado. The Tenth Circuit recognized the possible conflicts between the decisions. By deciding that the state permits granted only "permissive possession," not "real" ownership (even though the Utah permit authorized sale of the young under certain circumstances), the court was able to deny that Richards had any property right capable of being deprived by the prohibition on sale. *Id.* at 496. The constitutional cornerstone of *Allard* was thus irrelevant in *Richards*. *Allard's* holding that Congress did not intend the MBTA to apply to pre-acquired items was distinguished on the ground that the items of sale in *Richards* were live birds, not artifacts, which had not been "possessed" prior to the effective date of protection. *Id.* But *Richards* cited *Blanket and Hamel* in rejecting the *Fuld Store* line of cases on which *Allard* relied, and on the critical issue—whether Congress can forbid the sale of a legally acquired wildlife specimen or artifact—the cases appear to reach opposite conclusions. Whether such a prohibition exceeds congressional power because it violates the fifth amendment's due process clause as an uncompensated taking is the question that the Supreme Court will have to answer.

380. Civ. No. 75-W-1000 (D. Colo., June 7, 1978), *rev'd*, 48 U.S.L.W. 4013 (Nov. 27, 1979). The decision below has not been reported officially. References to that decision are cited to the page numbers in the unreported decision [hereinafter cited as *Opin.*].

381. *Allard v. Frizzell*, 536 F.2d 1332, 1334 n.1 (10th Cir. 1976) (preliminary procedural decision).

382. *Opin.*, *supra* note 380, at 2.

tion.<sup>383</sup> The three-judge panel started with the proposition that: “[t]he application of these acts to the plaintiff’s artifacts has a destructive and confiscatory effect on preexisting property rights in these items. The questioned regulations have destroyed the right to sell them.”<sup>384</sup>

The Bald Eagle Act allows possession and transportation of pre-1940 bird parts without explicitly forbidding their sale.<sup>385</sup> The MBTA contains very sweeping prohibitory language but does not deal with preexisting artifacts per se.<sup>386</sup> The court seized upon the congressional silence to interpret both statutes narrowly, thereby circumventing the “grave doubts” about their constitutionality.<sup>387</sup> The regulations were invalidated as being *ultra vires* and “violative of the plaintiffs’ Fifth Amendment property rights.”<sup>388</sup>

In interpreting the statutes, however, the court did not attempt a detailed analysis of statutory language or legislative intent. Instead, it noted that game birds are more numerous than endangered species.<sup>389</sup> In an attempt to distinguish *Delbay*, it found no indication that the statutes were “to be enforced ‘in the broadest possible terms.’”<sup>390</sup> The court also relied upon three cases decided between 1920 and 1925,<sup>391</sup> and on an unreported Tenth Circuit case.<sup>392</sup> Ironically, the court seemed unaware of the recent cases that have distinguished or rejected the earlier decisions.<sup>393</sup> Other legislation for dealing with preexisting artifacts<sup>394</sup> was compared with the statutes and regulations at issue. But had the panel

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383. 50 C.F.R. §§ 21.2(a), 22.2 (1978).

384. Opin., *supra* note 380, at 4.

385. 16 U.S.C. § 668 (1976).

386. Unless permitted by regulation promulgated pursuant to *id.* at § 704, the Act flatly forbids the hunting, killing, sale or transportation “at any time, by any means or in any manner” of “any migratory bird, [or] any part.” *Id.* at § 703.

387. Opin., *supra* note 380, at 10. The panel also made the rather dubious assumption that Congress was aware and approved of the shallow *Fuld Store* opinion when it later amended the Act. *Id.*

388. *Id.* at 11.

389. This irrelevant reversion to the mentality exhibited by the court in the dismissal of the MBTA informations, *see* notes 345–46 and accompanying text *supra*, was not cured by the court’s further preoccupation with the blackbird roosting problem. Opin., *supra* note 380, at 12. Blackbirds were the subject of *Society of Animal Rights v. Schlesinger*, 512 F. 2d 915 (D.C. Cir. 1975).

390. Opin., *supra* note 380, at 7. *See also* 16 U.S.C. § 703 (1976), reproduced in relevant part note 386 *supra*.

391. *See* notes 340–49 *supra*.

392. *United States v. Aitson*, No. 74–1588 (10th Cir., July 21, 1975). The rationale for the court’s reliance on this case is unknown.

393. *See* notes 351, 355 *supra*. It is ironic because public interest groups who would have alerted the court to those cases and the new direction of the law were not allowed to intervene in the suit. *Allard v. Frizzell*, 536 F.2d 1332 (10th Cir. 1976.)

394. The court inaccurately characterized the 1976 Amendments to the ESA, Pub. L. No. 94–359, 90 Stat. 911 (1976) (codified at 16 U.S.C. § 1539(f) (1976)), as “providing a three-year



read the statutes more thoroughly, its conviction might have been less unambiguous.<sup>395</sup>

On the constitutional issue, the three-judge panel acknowledged that Congress has broad power to exclude things from interstate commerce, but asserted, as the cornerstone of its holding, that there is an implicit limitation on that power:

We would submit, however, that the Supreme Court has never upheld the power of Congress to deprive a person forever of the right to dispose of his private property through commercial channels where such property was legally acquired—in contravention of no public policy—and where the property is not only harmless in itself, but also has intrinsic value.<sup>396</sup>

That, of course, is the question; whether it is also the conclusion awaits the Supreme Court's disposition.<sup>397</sup>

Even with the shortcomings of the panel opinion, it still cannot be asserted with assurance that the result is entirely wrong. Artifacts dealers do have a legitimate interest in their livelihood, an interest entitled to more protection than, for example, the privilege of sport hunting.<sup>398</sup> The regulations at issue do not "destroy" plaintiffs' occupations, but they do make them more restricted and difficult. Congress possibly did not intend to impose such hardship, although in the case of both the Bald Eagle Act and the MBTA Congress was reacting to a situation in which it deemed radical, sweeping remedies to be just as necessary as in the case of the ESA.<sup>399</sup> Thus, the narrow interpretation is the easy solution, but this path is taken at the expense of diluting the protection of birds—a task onerous enough without further judicially imposed constraints. As a constitutional matter, the question posed as a conclusion by the court still remains: can Congress forbid the sale of an otherwise inoffensive item that was legally

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exemption allowing pre-Act scrimshaw and sperm whale oil . . . to be sold commercially." Opin., *supra* note 380, at 9. In fact, the Amendments provide that the Secretary "may exempt" these products, but only if an application for exemption is made within one year of the effective date of applicable regulations that the Secretary is directed to prescribe, and only if that application contains a complete and detailed inventory of all products for which exemption is sought. 16 U.S.C. §§ 1539(f)(2), (3)(A), (B). The regulations pertaining to these exemptions were promulgated on June 2, 1977. 42 Fed. Reg. 28, 139 (codified at 50 C.F.R. § 222-1.28 (1978)), and provide that all applications for exemptions must have been received by August 18, 1977. 50 C.F.R. § 222.11-2(d) (1978). The court also noted that regulations under the MMPA exempt pre-Act animals, 50 C.F.R. § 18.25, without also noting that, by its terms, the only MMPA prohibitions against possession or sale of marine mammals extend merely to animals "taken" in violation of the Act, 16 U.S.C. § 1372(a)(3).

395. See notes 386, 394 *supra*.

396. Opin., *supra* note 380, at 8.

397. The Supreme Court unanimously reversed *Allard* while this article was being prepared for publication. *Andrus v. Allard*, 48 U.S. L.W. 4013 (Nov. 27, 1979).

398. *Baldwin v. Fish & Game Comm'n*, 436 U.S. 371 (1978).

399. *E.g.*, *TREFETHAN*, *supra* note 67, at 149-54.

acquired? While the wisdom of such a course is debatable, the authorities indicate that Congress does have the power to do so.

*C. Hunting and Vagueness, Killing and Scierter*

Among the federal species statutes, only the MBTA is of sufficient antiquity for a sizable body of judicial interpretation to have grown up around it. That law has evolved to the point where two related constitutional questions are now coming into focus, both of which stem from the long line of authority holding that no scienter or guilty intent need be shown to prove a violation of the MBTA.<sup>400</sup> More comprehensive hunting regulations of recent vintage have inspired contentions, so far unsuccessful, that the regulations are so vague that no sufficient notice of criminal liability is given.<sup>401</sup> Federal prosecutors have also been successful in convicting business entities of negligent and even accidental activities causing bird mortality.<sup>402</sup> Constitutional questions have not been litigated in these latter cases, but possible future extensions of the doctrine will lead inevitably to constitutional attack.

Since 1938 Fish and Wildlife Service regulations have made it illegal to hunt game birds over a "baited" area.<sup>403</sup> The regulations and a judicial temporal extension have been repeatedly upheld, even when the defendant is not shown to have had knowledge of the bait.<sup>404</sup> In 1972, the regulations were amended to prohibit hunting over the area for at least ten days after the "complete removal" of the bait.<sup>405</sup> In *United States v. Jarman*,<sup>406</sup> defendants were convicted of hunting over an area from which the bait had been removed several days before. They contended on appeal that the baiting regulations were unconstitutionally vague. "In particular they assert that enforcement of the new provision deprives them of liberty and property without due process in violation of the 14th Amendment since it cannot be determined with any degree of certainty what constitutes 'complete removal' of the bait."<sup>407</sup> Noting that the 1972 change

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400. *United States v. Reese*, 27 F. Supp. 833 (W.D. Tenn. 1939). See M. BEAN, *supra* note 27, at 76-85; Coggins & Patti, *supra* note 320, at 183-89; Margolin, *Liability Under the Migratory Bird Treaty Act*, 9 *ECOLOGY L. Q.* 789 (1979).

401. *United States v. Jarmon*, 491 F. 2d 746 (4th Cir. 1974).

402. *United States v. FMC Corporation*, 572 F.2d 902 (2d Cir. 1978).

403. Pres. Proc. No. 2245, Reg. 3 (July 26, 1937), 2 Fed. Reg. 1355 (1937) (current version codified at 50 C. F. R. § 20.21(i) (1978)).

404. E.g., *Rogers v. United States*, 367 F.2d 998 (8th Cir. 1966); *Koop v. United States*, 296 F.2d 53 (8th Cir. 1961); *United States v. Schultze*, 28 F. Supp. 234 (W.D. Ky. 1939).

405. 37 Fed. Reg. 13,472 (1972).

406. 491 F.2d 764 (4th Cir. 1974).

407. *Id.* at 766.

made the regulation more precise than its predecessor, the court rejected the contention.<sup>408</sup>

In *United States v. Delahoussaye*,<sup>409</sup> defendants had been hunting from a duck blind about 300 yards from bait and decoys. They were convicted of hunting in a "baited area" and in an area benefitting from the presence of live decoys of which they knew "or should have known."<sup>410</sup> They contended on appeal that the phrases describing the area were overly vague, especially in combination with the "should have known" standard. The Fifth Circuit, while recognizing that the areas as defined were not geographically precise, as they could expand or contract with wind or weather, affirmed the convictions.<sup>411</sup> A possibly conflicting 1961 decision<sup>412</sup> was distinguished. The court also held that the regulation was necessary for enforcement, sufficiently precise, and would make the "hunters resist the temptation to sail close to the wind."<sup>413</sup>

In neither instance was a good case made that defendants were truly ignorant of the circumstances or without any guilty knowledge. Nevertheless, it is quite possible that a hunter who believes he is following the law and regulations to the letter can be punished as a criminal: *Jarman* recognized this possibility, but stated that "even an unknowing violation will support a conviction."<sup>414</sup> This departure from the normal rules for criminal liability arises because MBTA violations are treated as "public welfare" offenses. Under the *Morissette*<sup>415</sup> rationale, in order to promote a social aim, some innocent but *malum prohibitum* activities are punishable if no stigma is attached and the penalty is mild. In the case of MBTA regulations, the prevailing philosophy seems to be that the hunter essen-

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408. The court declared that the 1972 amendment did not change the "basic proviso" of the regulations, "but only defined precisely in terms of days the extended period during which an area is regarded as baited," *id.* at 766, adding that the changes were not "as startling an innovation as the defendants would have us believe. Courts had interpreted the original regulation to hold that the attraction of bait remains even after complete removal." *Id.* at 766 n.3 (citation omitted).

409. 573 F.2d 910 (5th Cir. 1978).

410. *Id.* at 912; 50 C.F.R. § 20.21(f), (i) (1978).

411. 573 F.2d at 912.

412. In *United States v. Oleson*, 196 F. Supp. 688, 690-91 (S.D. Cal. 1961), the court held that the "baited area" extended only as far as 200 yards from the bait, finding a state regulation to that effect controlling. The *Delahoussaye* court found no parallel here and further indicated that the federal regulation would control in any event. 573 F.2d at 913.

413. 573 F.2d at 912.

414. 491 F.2d at 766.

415. *Morissette v. United States*, 342 U.S. 246, 252-61 (1952). The Court in *Morissette* read a scienter requirement into a federal conversion statute, but it contrasted that statute with regulations creating "public welfare offenses" that did not readily fit "accepted classifications of common-law offenses." In the latter, "penalties commonly are relatively small, and conviction does no grave damage to an offender's reputation." Such regulations do not require a showing of criminal intent. *Id.* at 255-56. *Cf. United States v. Dotterweich*, 320 U.S. 277 (1943); *United States v. Balint*, 258 U.S. 250 (1922).

tially assumes the risk of violation, given the knowledge that hunting is an easily revocable and often abused privilege. And, in fact, the reported cases indicate that defenses based on lack of guilty intent are more often post hoc technical ploys to force the government to prove state of mind rather than good faith professions of mental innocence.<sup>416</sup>

In the other and more recent line of cases, the courts have imposed criminal liability under the MBTA despite the prosecutor's concession that there was no intent to kill.<sup>417</sup> Three unreported decisions upheld convictions of oil companies for maintaining uncovered oil pits in which water fowl became fouled and died.<sup>418</sup> In *United States v. Corbin Farm Service*,<sup>419</sup> defendant were accused of killing migratory birds by negligently spraying a dangerous pesticide. The court held that no intent to kill was required for conviction. The Second Circuit in *United States v. FMC Corporation*<sup>420</sup> affirmed the conviction of a pesticide manufacturer who had accidentally discharged lethal wastewater into a pond frequented by birds, causing the death of many in spite of defendant's efforts to rectify the situation.<sup>421</sup> The *FMC* court imposed strict criminal liability premised in part on the ultrahazardous nature of defendant's business.<sup>422</sup> These cases are logical outcomes of the very broad language of the MBTA<sup>423</sup> and are logical extensions of the "no scienter" concept in "public welfare" cases. Yet because they create an open-ended criminal liability and without giving any indication of the outer boundaries of the offense,<sup>424</sup> future applications may be subject to constitutional attack. For whatever the circumstances, our system has not before countenanced criminal liability for an unlimited range of innocent acts, either negligently undertaken or with accidental consequences. Perhaps, in this and other areas of

416. *Delahoussaye* is an example: From the facts given in the opinion it appeared that defendants could hardly have been completely unaware of bait and decoys. 573 F.2d at 912.

417. See Coggins & Patti, *supra* note 320.

418. *United States v. Equity Corp.*, Cr. No. 75-51 (D. Utah, Dec. 8, 1975); *United States v. Stuarco Oil Co.*, No. 73-CR-129 (D. Colo., Aug. 17, 1973); *United States v. Union Tex. Petroleum*, No. 73-CR-127 (D. Colo., July 11, 1973). See Coggins & Patti, *supra* note 320, at 183-84.

419. 444 F. Supp. 510 (E.D. Cal.), *aff'd*, 578 F.2d 259 (9th Cir. 1978).

420. 572 F.2d 902 (2d Cir. 1978).

421. See Coggins & Patti, *supra* note 320, at 185-90 (discussion of *United States v. FMC Corporation*).

422. After an extensive discussion of strict liability doctrines in tort law for ultra-hazardous activities, the court declared that "FMC engaged in an activity involving the manufacture of a highly toxic chemical; and FMC failed to prevent this chemical from escaping into the pond and killing birds. This is sufficient to impose strict liability on FMC." 572 F.2d at 908.

423. The Act forbids killing "by any means or in any manner," 16 U.S.C. § 703 (1976), and exempts only taking pursuant to federal permit or regulation. *Id.* at § 704.

424. See Coggins & Patti, *supra* note 320, at 190. See also Margolin, *supra* note 400; Comment, 36 WASH. & LEE L. REV. 241 (1979).

human conduct, the availability of criminal punishment for all but very careful means of operation would be a worthwhile deterrent, but whether it squares with our constitutional history is questionable.

The MBTA cases take on added significance because their rationale can be extended into enforcement of the other federal wildlife statutes whose penalties are far more severe.<sup>425</sup> In the case of endangered species, for instance, a regulation makes any human activity that "significantly disrupts" the behavior of a listed species subject to prosecution as a prohibited "taking."<sup>426</sup> It may be that the potential harshness and vagueness of such rules will be ameliorated by prosecutorial and judicial "common sense" lawmaking in future instances, but courts must confine as well as define the prohibited behavior.<sup>427</sup>

Whether or not federal wildlife law constitutionally may assimilate foreign law, make criminal the sale of a legally acquired artifact, or punish an act done without guilty intent, the validity of the underlying federal regulatory structure in general will not be affected. Assuming that validity, the effect of federal law on state law should be examined.

## V. FEDERAL PREEMPTION OF STATE WILDLIFE LAW

Under the supremacy clause of the United States Constitution,<sup>428</sup> a state law or regulation is preempted if it is inconsistent with a federal law or if it is in a field which federal law was intended to occupy exclusively.<sup>429</sup> Delineating the scope of preemption in the area of wildlife law will continue to pose difficult problems in the foreseeable future, because

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425. *But see* United States v. FMC, 572 F.2d at 908 (strict liability upheld in part due to mild penalties).

426. 50 C.F.R. § 17.3 (1978). The Fish and Wildlife Service's interpretation of this statute contained in the regulation has been criticized, but it appears to have been accepted by the Court in *TVA v. Hill*, 437 U.S. 153, 184-85 n.30 (1978). *See* Coggins & Patti, *supra* note 320, at 194-95. A civil injunction premised on violation of the ESA and implementing regulation was entered in *Palila v. Hawaii Dep't of Land & Natural Resources*, 471 F. Supp. 985 (D. Hawaii 1979).

427. One possible solution is proffered in Coggins & Patti, *supra* note 320, at 192;

It is suggested, therefore, that for an act to be deemed a criminal violation under the MBTA, it must be purposeful (that is, the act must be intended, though not necessarily the consequences); it must involve a potentially lethal (to birds) agent (poisons, oil, pesticides, chain saws, guns, power lines, traps, fire, etc.); there must be some degree of "culpability" in the action; and the consequences for bird mortality must be generally foreseeable should the operation go astray through negligence or accident.

428. U.S. CONST. art. VI, cl. 2.

429. *Kleppe v. New Mexico*, 426 U.S. 529, 543 (1976); *cf.*, e.g., *Burbank v. Lockheed Air Terminal, Inc.*, 411 U.S. 624 (1973).

The impact of the commerce clause on state laws should be distinguished from that of the supremacy clause. The Oklahoma statute at issue in *Hughes v. Oklahoma*, 441 U.S. 322 (1979), for instance, was invalidated not because of congressional action preempting it, but because it burdened interstate commerce. *See* Part I-C *supra*.

the federal statutes contemplate a large implementation and enforcement role for the states.<sup>430</sup> For analytical purposes, the controversial areas can be divided into commerce regulation, regulation of taking and commerce in wildlife by Native American Indians, public land management, and direct species protection. Preemption lawsuits over wildlife regulation have increased considerably in recent years, and, as doubts about the validity of federal regulation are overborne, even more litigation is probable.

*A. Preemption of State Laws Regulating Commerce in Wildlife*

Four state laws that imposed commercial prohibitions beyond federal restrictions have been attacked on the ground of asserted federal preemption. Although New York laws were upheld while those of Maryland and California were invalidated, the decisions<sup>431</sup> are essentially consistent when the differing circumstances are considered.

The Endangered Species Conservation Act of 1969<sup>432</sup> prohibited the importation of species listed as endangered, but contained neither a preemption nor a saving clause.<sup>433</sup> New York, in the Mason<sup>434</sup> and Harris<sup>435</sup> Acts, prohibited the importation, sale, or possession with intent to sell of not only the federally listed species but also additional species.<sup>436</sup> Challenges to the New York statutes in state and federal courts failed on all counts. In *A.E. Nettleton Company v. Diamond*,<sup>437</sup> the plaintiff, a reptile hide renderer, contended that the Mason Law violated the supremacy clause. Conceding that the federal act was "a piece of comprehen-

430. *E.g.*, 16 U.S.C. §§ 709a (MBTA), 1333, 1336 (WF-RHBA), 1379 (MMPA), 1535, 1540(e)(1) (ESA) (1976).

431. *Fouke Co. v. Brown*, 463 F. Supp. 1142 (E.D. Cal. 1979); *Fouke Co. v. Mandel*, 386 F. Supp. 1341 (D. Md. 1974); *Palladio, Inc. v. Diamond*, 321 F. Supp. 630 (S.D.N.Y. 1970), *aff'd per curiam*, 440 F.2d 1319 (2d Cir.), *cert. denied*, 404 U.S. 983 (1971); *A.E. Nettleton Co. v. Diamond*, 27 N.Y.2d 182, 264 N.E.2d 118, 315 N.Y.S.2d 625 (1970), *appeal denied sub nom. Reptile Prod. Ass'n v. Diamond*, 401 U.S. 969 (1971).

432. Pub. L. No. 91-135, 83 Stat. 275 (codified at 16 U.S.C. § 168aa-cc (1970) and repealed 1973).

433. The inadequacies of the 1969 legislation are described in Coggins, *Conserving Wildlife Resources: An Overview of the Endangered Species Act of 1973*, 51 N.D.L. Rev. 315, 317-18 (1974). See also Palmer, *Endangered Species Protection: A History of Congressional Action*, 4 ENVTL AFF. 255 (1975).

434. 1970 N.Y. Laws, ch. 1048 (current version at N.Y. ENVIR. CONSERV. LAW § 11-0536 (McKinney Supp. 1979-80)).

435. 1970 N.Y. Laws, ch. 1047 (current version at N.Y. ENVIR. CONSERV. LAW § 11-0535 (McKinney 1972 & Supp. 1979-80)).

436. New York outlawed sale of all large spotted cat furs, for instance, while just a few of those species were included on the federal list. See Note, *Federal and State Protection Against Commercial Exploitation of Endangered Wildlife*, 17 CATH. LAW. 241 (1971).

437. 27 N.Y.2d 182, 264 N.E.2d 118, 315 N.Y.S.2d 625 (1970), *appeal denied sub nom. Reptile Prods. Ass'n v. Diamond*, 401 U.S. 969 (1971).

sive legislation”<sup>438</sup> (which in fact it was not),<sup>439</sup> the New York Court of Appeals found that there was no real conflict between the two, and that enforcement of the New York statute would not impair the effectiveness of the federal act.<sup>440</sup> Looking then to congressional intent, the court could not locate “the unequivocal intent which is necessary before we can decree pre-emption.”<sup>441</sup> On the contrary, the court found in the Act, in other federal legislation, and in the regulations, an intention to allow states to regulate with respect to both indigenous and foreign wildlife.<sup>442</sup> In *Padillo, Inc. v. Diamond*,<sup>443</sup> the same arguments made by a Massachusetts importer of alligator products were deemed by the federal district court insufficient to raise a substantial federal question. The court adopted the *Nettleton* preemption analysis and held that the Interior Secretary’s listing of endangered species did not limit or bind the state.<sup>444</sup>

Thereafter Congress enacted the Marine Mammal Protection Act (MMPA), and the 1973 Endangered Species Act, each of which contained language relevant to preemption. The MMPA expressly voids state laws regulating the taking of marine mammals—with a provision allowing the states to reassume jurisdiction at the discretion of the Secretary<sup>445</sup>—but is silent on state commercial regulation. The 1973 ESA is somewhat more specific: it voids state commercial regulation that permits actions prohibited by federal law or that prohibits “what is authorized pursuant to an exemption or permit provided for” by federal law or regulation.<sup>446</sup> Otherwise state conservation regulations shall stand, and states

438. 27 N.Y.2d at 190, 264 N.E.2d at 121, 315 N.Y.S.2d at 630 (footnote omitted).

439. See the authorities cited in notes 433 & 436 *supra*.

440. 27 N.Y.2d at 190, 264 N.E.2d at 122, 315 N.Y.S.2d at 630.

441. *Id.* at 191, 264 N.E.2d at 122, 315 N.Y.S.2d at 631.

442. The court noted that section 7 of the 1969 Act, Pub. L. No. 91-135, 83 Stat. 275 (codified at 16 U.S.C. § 168aa-cc (1970) and repealed in 1973), makes persons who sell or transport wildlife or products of wildlife taken or sold in violation of any state or foreign law subject to the Act’s enforcement provisions, that 16 U.S.C. § 667e (1976) provides that once brought into any state, products of birds and game animals are subject to state law to the same extent as though the animals or birds had been produced in the state, and that the regulations promulgated pursuant to the 1969 Act provide that those regulations “shall [not] be construed to relieve any person from any provision of any other laws, rules, or regulations of the States or the United States.” 27 N.Y.2d at 191, 264 N.E.2d at 122, 315 N.Y.S.2d at 631 (quoting 35 Fed. Reg. 8,495 (1970)). The court concluded that Congress intended state laws to continue in effect.

443. 321 F. Supp. 630 (S.D.N.Y. 1970), *aff’d per curiam*, 440 F.2d 1319 (2d Cir.), *cert. denied*, 404 U.S. 983 (1971).

444. *Id.* at 634.

445. 16 U.S.C. § 1379 (1976).

446. *Id.* at § 1535(f).

can prohibit taking not expressly proscribed by federal law.<sup>447</sup> Both statutes contemplate cooperative state-federal implementation programs.<sup>448</sup>

The Maryland preemption case arose from a provision in the MMPA which, in effect, exempts one marine mammal harvest program from its general moratorium on the taking of or commerce in marine mammals. Since 1911 the United States has undertaken a harvest of fur seals in the Pribilof Islands pursuant to a treaty<sup>449</sup> and the Fur Seal Act,<sup>450</sup> both of which were inspired by fears that the seal herds would be wiped out if open-sea sealing were allowed to continue. Fearing that Japan would recommence that practice if the Fur Seal Treaty were renounced,<sup>451</sup> Congress in the MMPA allowed the continuation of the hunt,<sup>452</sup> while instructing the Secretary of the Interior to determine whether fur seal populations are at optimal size, and, if not, then through the State Department to renegotiate the Treaty.<sup>453</sup> The United States sells the fur seal skins to the Fouke Company and remits shares of the proceeds to the signatory nations.

A 1973 Maryland statute flatly forbade importation into or sales of seals within the state,<sup>454</sup> with a few exceptions not here relevant. Fouke's challenge to the state law was sustained on preemption grounds.<sup>455</sup> The court held that the statute "frustrate[d] the commercial activity" contemplated by the Treaty and the Fur Seal Act,<sup>456</sup> and was invalid on those bases alone. With respect to the MMPA, the court noted the omission of "importation" from the preemption section, but held that the overall purpose of Congress to develop a unified, integrated management system required the conclusion "that the absence of a specific congressional intent, insofar as section 1379 is concerned, to preempt state law does not alter the fact that . . . importation was, by the very nature of the enactment of the MMPA, necessarily preempted for federal control."<sup>457</sup>

The same plaintiff succeeded in voiding a similar California statute five

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447. *Id.* After voiding conflicting state law, the section goes on to state that the Act "shall not otherwise be construed to void any State law or regulation which is intended to conserve migratory, resident, or introduced fish or wildlife, or to permit or prohibit sale of such fish or wildlife." *Id.*

448. 16 U.S.C. §§ 1379 (MMPA), 1535(a)-(e) (ESA) (1976).

449. Treaty for the Preservation and Protection of Fur Seals, July 7, 1911, 37 Stat. 1542, T.S. No. 564. Following World War II, the countries renegotiated this treaty. Interim Convention on Conservation of North Pacific Fur Seals, Feb. 9, 1957, 8 U.S.T. 2283, T.I.A.S. No. 3948.

450. 16 U.S.C. §§ 1151-1187 (1976).

451. S. REP. NO. 863, 92d Cong., 2d Sess. 3-6 (1972).

452. 16 U.S.C. § 1372(a)(2) (1976).

453. *Id.* at § 1378(b).

454. MD. NAT. RES. CODE ANN. § 10-419 (1974).

455. *Fouke Co. v. Mandel*, 386 F. Supp. 1341, 1356 (D. Md. 1974).

456. *Id.*

457. *Id.* at 1360.



years later.<sup>458</sup> The American alligator, once listed as an endangered species, was downlisted to "threatened" status,<sup>459</sup> which had the effect of allowing some taking in several Louisiana parishes. The Fouke Company obtained a federal license to purchase, process, and sell domestically such alligator hides. Together with a California retailer, Fouke claimed that the California statute forbidding importation into or sale within the state was preempted by federal law. The court agreed without extended discussion or citation.<sup>460</sup>

These cases in the aggregate establish little in the way of practical guidance. The New York decisions are easily distinguished from the later cases because the New York statutes covered species toward which there was no federal policy, while the Interior Department was actively involved in the regulation of both fur seals and alligators. All three instances can be considered abnormal, for state statutes, if any, more often provide less protection for the designated species than do the federal statutes. Indeed, that is the very reason for the enactment of the federal laws.<sup>461</sup> The California case was a straightforward application of the federal statute. The Maryland case perhaps went too far both in attributing an overriding federal goal of unification to the MMPA while ignoring its overriding purpose of protection—a purpose arguably served by the Maryland statute—and in discounting the lack of express legislative determination to preempt or control such an exercise of the state's police power.<sup>462</sup> In any event, future cases are likely to involve state attempts to assist rather than retard wildlife commerce, and future arguments might center on the limits of interstate commerce. Given the plenary federal power over interstate commerce, it is safe to conclude that federal preemption of conflicting state commercial statutes is complete except to the extent that Congress omitted certain species from its protective umbrella or authorized more restrictive state legislation.

### *B. Preemption on Indian Reservations and the "Usual and Accustomed Places"*

Both the potential scope of federal preemption and the uncertainties attending its application are evident in the Indian cases. No attempt at a

458. *Fouke Co. v. Brown*, 463 F. Supp. 1142 (E.D. Cal. 1979).

459. 40 Fed. Reg. 44, 412 (1975) (codified at 50 C.F.R. §§ 17.11, 17.42(a) (1978)). The Secretary may by regulation prohibit some or all taking of threatened species. 16 U.S.C. § 1533(d) (1976).

460. 463 F. Supp. at 1144.

461. See, e.g., *American Horse Protection Ass'n v. Department of the Interior*, 551 F.2d 432, 438, 440 (D.C. Cir. 1977) (interpreting the WF-RHBA).

462. Note, *Federal Preemption: A New Method for Invalidating State Laws Designed to Protect Endangered Species?*, 47 COLO. L. REV. 261 (1976).

comprehensive survey or analysis is possible here,<sup>463</sup> but a summary of a few recent decisions involving Indian treaty beneficiaries who attempted to void state regulation of their hunting and fishing will demonstrate the operation of preemption.

Indian treaties, like international treaties, are the supreme law of the land and override conflicting state laws.<sup>464</sup> Supreme Court resolution of disputes between states and tribes has exhibited a curious duality. The treaties most often at issue retain for the Indians the right to hunt and fish on their reservations and at the "usual and accustomed places."<sup>465</sup> For a long time, it was held that states had no regulatory power whatsoever over Indian practices on the reservation<sup>466</sup> but that states could restrict some off-reservation practices if necessary for conservation of a particular wildlife resource.<sup>467</sup> The difference in treatment of the twin rights created by the same federal document was never satisfactorily explained,<sup>468</sup> and some argued that all state regulation was necessarily improper.<sup>469</sup> The Supreme Court in 1977 resolved the ambiguity the opposite way by holding that states could impose limitations even on reservation taking if it threatened to eliminate the resource.<sup>470</sup> In other words, even in the special *sui generis* instance of fish and wildlife exploitation by Indian treaty beneficiaries, the conservation interest in preserving the resource has been accorded an importance sufficient to allow limited state infringement on the federal right.

Where a state oversteps the limits of its confined role, however, the courts are quick to react in a drastic manner. In the landmark *Boldt* decision,<sup>471</sup> the court interpreted the treaty as giving the tribe the right to take half of the fish run,<sup>472</sup> and it retained jurisdiction of the case to ensure that

463. For a general discussion of the effect of federal law on treaty rights, see Wilkinson & Volkman, *Judicial Review of Indian Treaty Abrogation: "As Long As Water Flows, or Grass Grows Upon the Earth,"—How Long a Time Is That?*, 63 CALIF. L. REV. 601 (1975). See also Coggins & Modrcin, *supra* note 3.

464. *E.g.*, *Memominee Tribe of Indians v. United States*, 391 U.S. 404, 411 n.12 (1968); *United States v. Winans*, 198 U.S. 371 (1905).

465. See Coggins & Modrcin, *supra* note 3, at 392–95.

466. See Johnson, *The States Versus Indian Off-Reservation Fishing: A United States Supreme Court Error*, 47 WASH. L. REV. 207 (1972).

467. See, *e.g.*, *Department of Game v. Puyallup Tribe*, 414 U.S. 44 (1973) (Puyallup II); *Puyallup Tribe v. Department of Game*, 391 U.S. 392 (1968) (Puyallup I). However, state regulation could not discriminate against Indian fishing. See *Department of Game v. Puyallup Tribe*, 414 U.S. 44 (1973) (Puyallup II).

468. See Coggins & Modrcin, *supra* note 3, at 392–95; Johnson, *supra* note 466.

469. Johnson, *supra* note 466.

470. *Puyallup Tribe, Inc. v. Department of Game*, 433 U.S. 165 (1977) (Puyallup III).

471. *United States v. Washington*, 384 F. Supp. 312 (W.D. Wash. 1974), *aff'd*, 520 F.2d 676 (9th Cir. 1975), *cert. denied*, 423 U.S. 1086 (1976).

472. *Id.* at 343. The statement in the text is an oversimplification of the complex allocation formula eventually chosen.

the state and private fishermen would abide by its orders. Volatile political and legal controversy ensued. The Washington state courts ruled that the state agencies were without power to implement the federal court decree,<sup>473</sup> which was, according to the Washington Supreme Court, unconstitutional under the fourteenth amendment.<sup>474</sup> After that decision and after instances of state and private refusals to abide by the 1974 decree, Judge Boldt assumed more active supervision of the fishery. He ordered the state agencies to promulgate conforming regulations and threatened non-Indian fishermen with contempt charges for non-compliance.<sup>475</sup> On appeal of a group of such orders, the United States Supreme Court affirmed the angry, beleaguered trial court.<sup>476</sup>

Justice Stevens, writing for the majority, first considered and generally affirmed the fish allocation formula<sup>477</sup> worked out by the district court. He then preceeded to reject with ill-concealed disdain the State's constitutional and preemption arguments.

State-law prohibition against compliance with the District Court's decree cannot survive the command of the Supremacy Clause of the United States Constitution. . . . It is also clear that [the state agencies], as parties to this litigation, may be ordered to prepare a set of rules that will implement the Court's interpretation of the rights of the parties even if state law withholds from them the power to do so. . . .

Whether Game and Fisheries may be ordered actually to promulgate regulations having effect as a matter of state law may well be doubtful. But the District Court may prescind that problem by assuming direct supervision of the fisheries if state recalcitrance or state-law barriers should be continued. . . . The federal court unquestionably has the power to enter the various orders that state officials and private parties have chosen to ignore, and even to displace local enforcement of those orders if necessary to remedy the violations of federal law found by the court.<sup>478</sup>

The Court also held that non-party fishermen were bound by the decree under any of three theories and were thus subject to contempt proceedings.<sup>479</sup> The dissenting justices, though noting that the trial court was

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473. *Puget Sound Gillnetters Ass'n v. Moos*, 88 Wn. 2d 677, 565 P.2d 1151 (1977). The court held that the state Department of Fisheries was authorized "to act for conservation purposes only." *Id.* at 682.

474. *Washington State Comm'l Passenger Fishing Vessel Ass'n v. Tollefson*, 89 Wn. 2d 276, 571 P.2d 1373 (1977).

475. 459 F. Supp. 1020 (W.D. Wash. 1978).

476. *Washington v. Washington State Comm'l Passenger Fishing Vessel Ass'n*, 99 S. Ct. 3055 (1979), *aff'g*, 573 F.2d 1118 (9th Cir. 1978).

477. *Id.* at 3069-76.

478. *Id.* at 3079-80 (citations omitted).

479. *Id.* at 3078 n.32.

resorting “to the outer limits of its equitable powers,” did not dispute the validity or appropriateness of the remedies chosen.<sup>480</sup>

In short, it is abundantly clear that the preemptive effect of Indian treaties in conflict with state law is substantial, and that the judicial remedy may be wide, deep, and severe.

### *C. Preemption of State Law on Public Lands*

*Kleppe v. New Mexico* reaffirmed the notion that Congress can do whatever it wishes with wildlife regulation on the federal lands.<sup>481</sup> Congress, however, has not exercised that power to anywhere near its full extent. The degree of managerial discretion in the federal agencies varies greatly by system, but in most cases, Congress has directed the agency to defer to state wildlife law, although the extent of intended deference is often unclear.<sup>482</sup> The question is academic in most national parks because hunting is prohibited (although fishing is not).<sup>483</sup> Jurisdictional allocation on the other systems, particularly refuges, national forests, and Bureau of Land Management lands, however, is seen as a crucial issue by many state agencies.<sup>484</sup> Before *Kleppe*, the major federal land management agencies had reached an informal detente with their state counterparts by which the state agency had primary authority over hunting and fishing regulation while the federal agency was responsible for habitat maintenance and enhancement.<sup>485</sup> Whether that agreement could have withstood challenge in an appropriate case before *Kleppe*, and whether it can continue to bind under law, are questions not easily answered.

A typical statute is that governing the management of the National Wildlife Refuge System (NWRS) by the Fish and Wildlife Service:

The regulations permitting hunting and fishing of resident fish and wildlife within the System shall be, to the extent practicable, consistent with State fish and wildlife laws and regulations. The provisions of this Act shall not be construed as affecting the authority, jurisdiction, or responsibility of the several States to manage, control, or regulate fish and resident wildlife under State law or regulations in any area within the System.<sup>486</sup>

480. *Id.* at 3085 n.9 (Powell, J., dissenting).

481. See notes 171–75 and accompanying text *supra*.

482. See statutes quoted in text accompanying notes 486 & 489 *infra*.

483. 16 U.S.C. § 26 (1976) (Yellowstone National Park).

484. See Gottshalk, *The State Federal Partnership in Wildlife Conservation*, in *WILDLIFE AND AMERICA*, *supra* note 1, at 290; Note, *Regulation of Wildlife in the National Park System: Federal or State?*, 12 NAT. RESOURCE J. 627 (1972). But see Etling, *Who Owns the Wildlife?*, 3 ENVTL L. 23 (1970).

485. Gottshalk, *supra* note 484.

486. Natural Wildlife Refuge Administration Act of 1966, Pub. L. 89–669, 80 Stat. 927 (codified at 16 U.S.C. § 668dd(c) (1976)).

The meaning of this provision is obscure. Congress obviously did not attempt to define the extent of state "authority, jurisdiction, or responsibility" in 1966, saying only that if the states had it, they kept it. On the other hand, the first sentence obviously contemplates that the Secretary shall have primary responsibility for promulgating taking regulations: He is to follow state law, but only insofar as it is "practicable" to do so. States may exercise their police powers on federal lands so long as Congress has not assumed exclusive legislative jurisdiction or legislated contrary to state law.<sup>487</sup> In this instance, Congress appears to have given the Secretary power to override state law in particular instances where state law is deemed contrary to overriding federal purposes. A more definitive answer must await clarification by Congress or the courts.

The conclusion that federal agencies can (and in some cases must) override state hunting and fishing law is buttressed by the results of the Alaska Wolf litigation. The State of Alaska proposed to shoot a large number of wolves, many on federal lands, in order to increase populations of caribou, which are prey of wolves.<sup>488</sup> Congress provided in section 302(b) of the 1976 Bureau of Land Management Organic Act:

That nothing in this Act should be construed as authorizing the Secretary . . . [of Interior or Agriculture] to require Federal permits to hunt and fish on public lands . . . or as enlarging or diminishing the responsibility and authority of the States for management of fish and resident wildlife. However, the Secretary concerned may designate areas of public land . . . where, and establish periods when, no hunting or fishing will be permitted for reasons of public safety, administration, or compliance with provisions of applicable law.<sup>489</sup>

In *Defenders of Wildlife v. Andrus* (Alaska Wolf II), plaintiffs sued to halt the wolf hunt, asserting that the Secretary could not allow it without first preparing an environmental impact statement (EIS).<sup>490</sup> The Secretary argued that he was powerless to stop the hunt, and that therefore the preparation of an EIS would be a futile exercise. The court was thus forced to determine whether section 302(b) empowered the Secretary to stop the hunt. The District of Columbia District Court, after recounting the legislative history at length,<sup>491</sup> held for plaintiffs: "The administration of the public lands includes their administration for multiple-use purposes, such

487. *E.g.*, *Kleppe v. New Mexico*, 426 U.S. 529 (1976).

488. Following severe declines in caribou populations, the causes of which were in controversy, the Alaska agency embarked on the wolf eradication program and limited sport hunting of caribou. The wolf kill program has been highly controversial and has inspired a series of lawsuits.

489. Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1732(b) (1976).

490. *Defenders of Wildlife v. Andrus*, 9 ERC 2111 (D.D.C. 1977) (mem.) (Alaska Wolf II).

491. *Id.* at 2115-17.

as wildlife preservation, so that the Secretary can prevent, under certain circumstances, hunting on federal lands when a multiple use such as wildlife is seriously threatened.”<sup>492</sup> Since the Secretary had the power to override state law, his failure to exercise it in these exigent circumstances was ruled a major federal action, which, not being accompanied by an EIS, would be temporarily enjoined.<sup>493</sup> While the District of Columbia decision was on appeal, the Secretary “conceded” in a Ninth Circuit case that he had that power, but successfully argued that his inaction did not invoke the National Environmental Policy Act.<sup>494</sup>

The language of the Bureau of Land Management Organic Act is facially more restrictive of federal discretion than the provisions governing NWRS management. If the *Alaska Wolf II* interpretation is sustained, the federal role dominates in the delicate jurisdictional balance of wildlife regulation in the major federal lands systems. Even so, the federal land managers must or should defer to state game regulation where normal conditions exist.

### D. Preemption of Direct Species Protection and Management

The congressional solicitude shown state regulation on federal lands is not evident in the general federal wildlife species statutes. The designated species are to be protected at all times, in all places, from all person, and state management is authorized only insofar as it complies with federal law and regulations. *Kleppe v. New Mexico*<sup>495</sup> left open the question whether the federal government could regulate the taking of wildlife off federal lands. The Court need not have been so reticent, because Congress clearly has the power to do so under the treaty and commerce clauses.<sup>496</sup> The Court had implicitly sanctioned just such a federal power two generations before in upholding the MBTA, which governs taking by all persons, at any time, in any place, and by any means.<sup>497</sup> A long line of cases under the MBTA and the Bald Eagle Act have affirmed convictions for taking without distinguishing between the nature of the lands on which the offense took place. The inquiry must shift from power to inten-

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492. *Id.* at 2117.

493. *Id.* at 2119–20.

494. *Alaska v. Andrus*, 591 F.2d 537 (9th Cir. 1979) (*Alaska Wolf III*). The Secretary’s “concession” came about because the Solicitor General ruled that the Secretary was wrong as a legal matter. Remarks of Asst. Sec’y of the Department of Interior Herbst, National Wildlife Law and Policy Conference, Washington, D.C. (May 22, 1978).

495. 426 U.S. 529 (1976).

496. See notes 257–81 and accompanying text *supra*.

497. *Missouri v. Holland*, 252 U.S. 416 (1920).

tion: In any given instance, did Congress intend to preclude or override state law concerning the taking of fish or wildlife?

In the case of each federal species statute, the answer is both yes and no. Each federal law imposes minimum restrictions that the state law cannot contravene,<sup>498</sup> but most also allow more restrictive state legislation and invite state partnership in programs to advance the federal purposes.<sup>499</sup>

There are, surprisingly enough, few reported cases where federal preemption of direct state wildlife regulation on private lands was even peripherally at issue. The obligation of the federal government to retrieve wild horses that had strayed onto private lands was litigated in one case,<sup>500</sup> but the impact of conflicting state requirements, if any, was not raised. A lawsuit concerning control of wolves,<sup>501</sup> a threatened species, which were allegedly killing cattle on private lands was decided on the basis of the legality of the control program under the applicable federal regulations without mention of state law or preemption.<sup>502</sup> In each case, the court assumed that federal law was supreme and applicable.

In *People of Togiak v. United States*,<sup>503</sup> an oblique preemption question was raised and decided adversely to both federal and state agencies. The MMPA contains an express exemption for Alaskan Natives, who may continue subsistence and handicraft taking of marine mammals so long as the species is not endangered or depleted.<sup>504</sup> The MMPA clearly preempts state taking regulation as an initial matter,<sup>505</sup> but provides for retrocession of regulatory jurisdiction to the states, under continuing supervision of the federal agency, if the state laws are "consistent" with the federal statute and regulations.<sup>506</sup> The Interior Department proposed to return management jurisdiction over nine marine mammal species to the State of Alaska,<sup>507</sup> and seeing the legal quagmire it was about to enter, the Department purported to rescind the Native exemption.<sup>508</sup> The Alaska wildlife agency not only would have greatly restricted the otherwise allowable Native taking, but it is also prohibited by the Alaska Constitution

498. See Part IV-A *supra*.

499. E.g., 16 U.S.C. § 1535 (1976).

500. Roaring Springs Assoc. v. Andrus, 8 ELR 20696 (D. Ore. 1978) (federal government ordered to retrieve the horses).

501. Fund for Animals v. Andrus, 11 ERC 2189 (D. Minn. 1978).

502. The plan invalidated was a cooperative effort among state and federal agencies.

503. 470 F. Supp. 423 (D.D.C. 1979).

504. 16 U.S.C. § 1371(b) (1976).

505. *Id.* at § 1379(a)(1).

506. *Id.* at § 1379(a)(2).

507. 41 Fed. Reg. 15,173 (Apr. 9, 1976). See M. BEAN, *supra* note 27, at 365-68. The initial proposal was later restricted. 50 C.F.R. § 18.94(a) (1978).

508. 50 C.F.R. § 18.94 (a)(1) (1978).

from making special exemptions and is enjoined by it to manage wildlife on the “sustained yield principle,”<sup>509</sup> itself probably inconsistent with the MMPA.<sup>510</sup> Certain Natives sued to stop the transfer of jurisdiction over walrus hunting. It appeared that the court could have granted relief by reference to “consistency” alone, but Judge Green instead chose preemption as a ground for invalidating the transfer of jurisdiction.<sup>511</sup>

If [the federal statute preempts state jurisdiction], both the regulations purporting to transfer the control of walrus taking to the State of Alaska and the State’s prohibitions on subsistence hunting by Alaskan Natives are of no effect, for such regulations then improperly contravene the provisions of section 1371(b) which explicitly and more broadly than the Alaska laws allow native hunting.<sup>512</sup>

The court then dealt with a series of technical and “convoluted” federal arguments, and held that the exemption was a substantive requirement that overrode contrary state law, and could not be circumvented by obscure conceptualizing.<sup>513</sup>

An even more fundamental preemption issue was decided in the *Palila* case.<sup>514</sup> All of the classic elements were present: The state program reflected an intentional choice to accommodate sport hunting as much as possible, it operated on state lands, and its effect, although not its purpose, was to harm the habitat of a federally protected species. No commerce was involved, and Hawaii had not entered into a cooperative agreement for management of endangered species.<sup>515</sup> To the court, the only questions were whether the ESA was valid, whether the state defendants were violating it, and whether they could be sued. All three were

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509. ALAS. CONST. art. VIII, §§ 4, 15, 17.

510. M. BEAN, *supra* note 27, at 368. Cf. 16 U.S.C. § 1361(6) (1976): “[T]he primary objective of [marine mammal] management should be to maintain the health and stability of the marine ecosystem. Whenever consistent with this primary objective, it should be the goal to obtain an optimum sustainable population keeping in mind the optimum carrying capacity of the habitat.” On the difference between sustained yield and optimum sustainable population, see M. BEAN, *supra* note 27, at 335–42. But see Gaines & Schmidt, *Wildlife Population Management Under the Marine Mammal Protection Act of 1976*, 6 ELR 50096 (1976).

511. *People of Togiak v. United States*, 470 F. Supp. 423, 425 (D.D.C. 1979).

512. *Id.*

513. The Government argued that the provision exempting Native taking from the provisions of the Act meant that the state never relinquished control over them because the federal government never acquired it. The court said that the argument was “too ingenious and too facile” and “at odds . . . with the statutory scheme as a whole.” *Id.* at 426.

514. *Palila v. Hawaii Dep’t of Land & Natural Resources*, 471 F. Supp. 985 (D. Hawaii 1979).

515. *Id.* at 1002 n.55.



answered affirmatively and a "positive" injunction entered.<sup>516</sup> Preemption was not discussed as such, because the court correctly assumed that if the Act applied, it overrode conflicting state regulation.

The *Palila* decision confirms that state law must comport with federal law where Congress has acted to conserve or preserve certain wildlife species. It does not mean that federal agencies are supplanting state agencies or that the latter will become but impotent extensions of the former. Federal law is limited in its coverage of species. Birds and oceanic mammals are the only broad groups of species protected by federal statutes and while the list of endangered species is growing, it is unlikely ever to include more than a small percentage of indigenous wildlife species. There can be no doubt that federal wildlife law has expanded greatly and that it predominates where applicable. But in every case the states are accorded an important place in the federal scheme; the trend clearly is toward a coordinated system of interjurisdictional management with the state and federal agencies cooperating in the common goal of enhanced wildlife populations. The *Palila* case should go even further than *Kleppe* in convincing state agencies that cooperative wildlife management is more productive and important than adamant defense of historical turf.

## VI. CONCLUSION

Federal wildlife law will withstand constitutional challenge and will preempt conflicting state law.

That conclusion should be the beginning, not the end, of the matter. Once the beliefs about the inherent right of state agencies to manage wildlife free of federal influence (but with federal money) are overcome, a more productive era of wildlife management may emerge. It was the narrow orientation and intransigence of states and state agencies, responsible only to relatively small and self-interested constituencies, that brought the federal government into the field of wildlife regulation. The federal government is there to stay. When this simple but essential fact is accepted, new institutional arrangements with enhanced possibilities of success in the field will be possible.

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516. *Palila v. Hawaii Dep't of Land and Natural Resources*, Civ. No. 78-0030 (D. Hawaii, July 31, 1979) (Judgment and Order).